

THE  
CONSTITUTIONAL LAW  
OF THE  
UNITED STATES

SECOND EDITION

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BY

WESTEL WOODBURY WILLOUGHBY

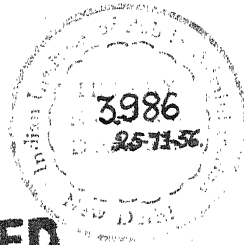
PROFESSOR OF POLITICAL SCIENCE, JOHNS HOPKINS UNIVERSITY;

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VOLUME I



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## PREFACE TO THE FIRST EDITION

In the preparation of this work, the aim has been to give a logical and complete exposition of the general principles of the constitutional law of the United States. The effort has been to ascertain and to discuss critically the broad principles upon which have been founded the decisions rendered by the Supreme Court of the United States in the leading cases, and thus to present, as a systematic whole, a statement of the underlying doctrines by which our complex system of constitutional jurisprudence is governed. The performance of this purpose has required that attention should be devoted rather to a consideration of those principles of our public law which are fundamental, and especially of those the possible implications of which are not yet certainly determined, than to a statement in minute detail of those adjudications which, in themselves, establish no general rule of law, or illustrate no novel application of one. This latter task is one which more properly belongs to compilers of digests or to the authors of more special text-books. It is confidently believed, however, that in the present work no really important case has been left unnoticed.

Such merit as the present work may possess must, then, consist in its systematic arrangement, and in the fact that, with reference to the constitutional principles which are discussed, it fully sets forth the processes of judicial reasoning by which they have been established, it suggests the corollaries which may be drawn from them, and it indicates the relations which they bear to one another and to the more general doctrines of American public law.

Whenever space has seemed to permit, the author has reproduced the language of the Federal Supreme Court. This has necessitated many and, at times, extended quotations. It is believed, however, that this practice will commend itself to the reader. Since the character of this work requires in any case that the arguments should be given, the authoritative language of the nation's highest tribunal is certainly preferable to a statement by a commentator of his understanding of the court's ruling or reasoning.

The author desires to make especial acknowledgment of the very great assistance which he has received from Hon. John C. Rose, United States District Judge, and Dr. Frank J. Goodnow, Professor of Constitutional and Administrative Law at Columbia University. Both of these friends have generously spared the time to read this treatise in the proof. That they have not, however, committed themselves to all of the positions assumed herein, hardly needs to be said.

The author wishes also to express generally his debt to the various law magazines published in this country. These journals are an honor to American legal scholarship, and to the articles contained in them the author owes more than he has been able specifically to acknowledge.

In conclusion, it may be added that, where appropriate, the author has repeated language used by him in an earlier and briefer work entitled *The American Constitutional System*.

The work as a whole is based upon lectures delivered during recent years to the graduate students in Political Science at the Johns Hopkins University.

June, 1910.

W. W. W.

## PREFACE TO THE SECOND EDITION

In the preface to the first edition of this work it was pointed out that it was the purpose of the author to discuss the fundamental propositions of the constitutional law of the United States, rather than to attempt the task, which belongs more properly to a digest or encyclopedia of law, of marshalling all of the pronouncements of the courts with reference to every specific set of facts which has involved questions of a constitutional character. This scope and method of treatment is continued in the present and enlarged edition. Though thus, in one sense, not exhaustive in character, it is believed that there will be found in the present work a statement of all significant questions which have arisen with reference to the construction of the Constitution of the United States and a discussion of the reasoning employed by the courts in answering them. This has necessitated liberal quotations from the opinions rendered by the courts, but in no other way is it practicable to present the true reasoning of their rulings and thus make plain their significance and applicability to future questions as they may arise.

In one important respect, however, the scope of the present edition is wider than that of the edition it replaces. This is as to the extent to which the attempt has been made to show, by an examination of the statutes of Congress, the manner in which the Federal Government has exercised, and is now exercising, the constitutional powers vested in it. The increase during recent years of Federal regulation has been so great that, without a knowledge of this phase of Federal growth, a very inadequate comprehension will be gained of American constitutional jurisprudence in its present stage of development.

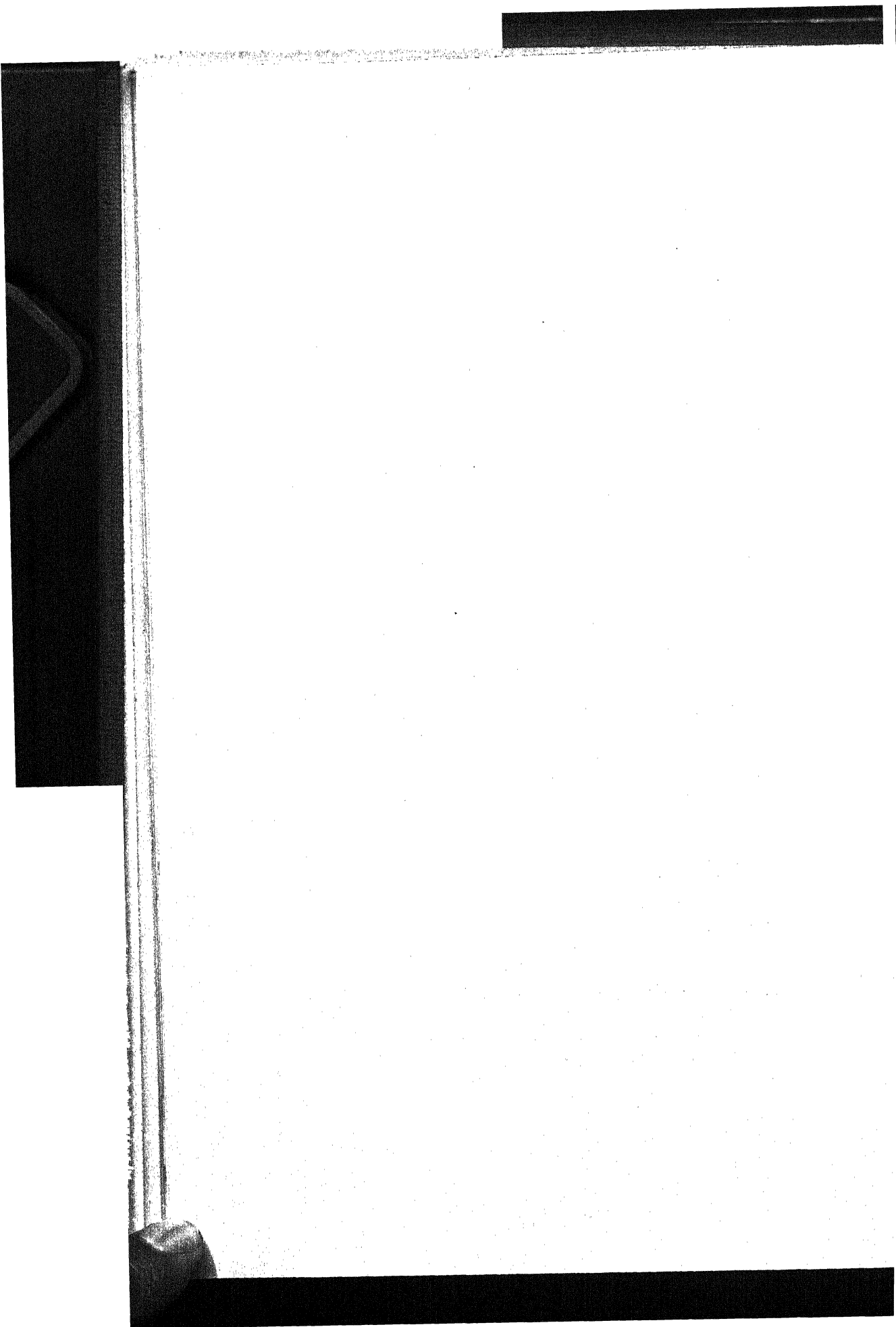
The author desires to make special acknowledgment of the obligation he is under to Dr. F. J. Goodnow, who not only spared the time to read the entire proof, but, upon many difficult points, made his learning and judgment available to the author.

For the preparation of the Table of Cases, the author is under obligation to one of his students, Mr. Leon Sachs.

The author desires also to repeat the acknowledgment, which he made in the Preface to the first edition of this work, of his indebtedness to articles which have appeared in American law journals. From this source he has drawn much inspiration as well as information.

October, 1928.

W. W. W.



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# CONSTITUTION OF THE UNITED STATES<sup>1</sup>

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1 The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2 No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3 Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.<sup>2</sup> The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4 When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

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<sup>1</sup> This reprint of the Constitution exactly follows the text of that in the Department of State at Washington, save in the spelling of a few words.

<sup>2</sup> Superseded by the 14th Amendment.

5 The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3. 1 The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof for six years; and each senator shall have one vote.

2 Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3 No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4 The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5 The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6 The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7 Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1 The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2 The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1 Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from

day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2 Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3 Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4 Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1 The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

2 No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1 All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills.

2 Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless



the Congress by their adjournment prevent its return; in which case it shall not be a law.

3 Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1 The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2 To borrow money on the credit of the United States;

3 To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4 To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5 To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6 To provide for the punishment of counterfeiting the securities and current coin of the United States;

7 To establish post offices and post roads;

8 To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9 To constitute tribunals inferior to the Supreme Court;

10 To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11 To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12 To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13 To provide and maintain a navy;

14 To make rules for the government and regulation of the land and naval forces;

15 To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.

16 To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17 To exercise exclusive legislation in all cases whatsoever, over such

district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18 To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1 The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2 The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3 No bill of attainder or *ex post facto* law shall be passed.

4 No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5 No tax or duty shall be laid on articles exported from any State.

6 No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7 No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8 No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign State.

SECTION 10. 1 No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2 No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3 No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

SECTION 1. 1 The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2 Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, than the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.<sup>3</sup>

3 The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

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<sup>3</sup> Superseded by the 12th Amendment.

4 No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5 In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6 The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7 Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1 The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2 He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3 The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of

disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1 The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2 In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3 The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1 Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2 The Congress shall have power to declare the punishment of treason,

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but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1 The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2 A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3 No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1 New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2 The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any

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manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1 All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2 This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3 The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States, and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS

ARTICLE I <sup>4</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

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<sup>4</sup>The first ten Amendments were adopted in 1791.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.



## ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI<sup>5</sup>

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII<sup>6</sup>

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of

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<sup>5</sup> Adopted, 1798.

<sup>6</sup> Adopted, 1804.

senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

### ARTICLE XIII<sup>7</sup>

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

### ARTICLE XIV<sup>8</sup>

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

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<sup>7</sup> Adopted, 1865.

<sup>8</sup> Adopted, 1868.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### ARTICLE XV <sup>9</sup>

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XVI <sup>10</sup>

The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

#### ARTICLE XVII <sup>11</sup>

1 The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

2 When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointment until the people fill the vacancies by election as the Legislature may direct.

3 This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

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<sup>9</sup> Adopted, 1870.

<sup>10</sup> Adopted, 1913.

<sup>11</sup> Adopted, 1913.

ARTICLE XVIII <sup>12</sup>

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX <sup>13</sup>

1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

2 Congress shall have power, by appropriate legislation, to enforce the provisions of this Article.

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<sup>12</sup> Adopted, 1919.

<sup>13</sup> Adopted, 1920.



# UNITED STATES CONSTITUTIONAL LAW

## CHAPTER I

### CONSTITUTIONAL LAW

The fundamental principle of American constitutional jurisprudence is that laws and not men shall govern. This means that when a power, exercised by an official or by a governmental organ, is challenged, legal authority therefor derived from some existing law must be shown, and that no valid law can exist save that which is recognized as such by the courts. The American courts recognize two great bodies of law; the so-called common law, which is a product of custom and judicial interpretation, and which, in large measure, we have inherited from England; and enacted law, which is the formal creation of the legislative organs of government. This formally enacted law is of two kinds: That embodied in written constitutions, and that enacted by the ordinary legislative bodies and termed statutes.

Independently of express statement to that effect, it has become axiomatic that no provision of a statute law is valid if not consistent with the provisions of the Constitution from which the enacting legislature derives its powers. A State statute inconsistent with the Constitution of that State is, therefore, invalid, and an act of Congress not warranted by the provisions of the Federal Constitution is similarly void. And the same legal invalidity attaches to the unconstitutional act of an executive or judicial organ of government. In addition to being subordinate to the provisions of the State Constitution, every act of a State official or organ must conform to the requirements of the Federal Constitution, and this applies as well to the provisions of a State Constitution, as to the statutes of its legislature.

#### § 1. The Courts and Unconstitutional Laws.

The principle that statutory law, in order to be recognized as valid by the courts, must, in all cases, be in conformity with constitutional requirements, is a product of American law, and though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States.<sup>1</sup> That, granting the supremacy of the National Government,

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<sup>1</sup> As to unconstitutional law under the new German constitution, see *American Political Science Review*, x, vol. XXI, p. 113, "Judicial Review of Legislative Acts in Germany," by F. F. Blachly.

and the subordinate constitutional status of the member States of the Union, the laws and other acts of these States should have their validity tested by the provisions of the United States Constitution, is, of course, a very different proposition from that which holds that measures enacted by the National legislature must meet the requirements of the National Constitution, for, in the one case, we have to deal with an inferior political body *vis à vis* a superior political authority; while, in the other case, we have presented the examination by the courts of the validity of the acts of a legislative body which derives its powers from the same constitutional source as do the courts themselves. Thus, when it is held that the enactments of the legislatures of the member States of the Union are of no legal force and effect, if not warranted by the provisions of the United States Constitution, there is applied a principle that is recognized and applied in the private as well as the public law of all constitutionally administered States, namely, that, to be valid, an agent must act within the authority granted him by his principal. Hence, when a law of a State of the American Union, whether embodied in an enactment of its legislature, or in the Articles of its written Constitution, is held void because not warranted by the United States Constitution, the rule applied is exactly similar to that which controls the courts of other countries when they have to deal with the acts of colonial or administrative bodies which have only those legislative or other ordinance-making powers which the sovereign authority has granted to them. In short, what controversy there has been in the United States as to the validity of laws of the individual States, as tested by the United States Constitution, has related solely to the constitutional status and powers of the individual States. No one has attempted to deny, that, if these States be viewed, as they now are universally viewed, as subordinate and non-sovereign bodies, their acts are without legal force in so far as they are not warranted by the provisions of the National Constitution.

When a State law is held void because not authorized by the Constitution of that State there is, of course, applied the same principle that is employed when an act of Congress is refused recognition by the courts because inconsistent with the United States Constitution. However, the courts, when judging as to the extent of the constitutional powers of a State legislature, are guided by a more liberal principle than is applied when dealing with Congress,—a practice that results from the constitutional theory that the National Government, and therefore its several departments, legislative, executive and judicial, possess only those powers which have been vested in them by the National Constitution, whereas, the States possess all powers except those which have expressly or by necessary implication been withheld from them by the National Constitution, and the further doctrine that these States, by their several written Constitutions, have vested in their several governments all the powers

reserved to them by the National Constitution except in so far as, by express provision or necessary implication, it has been otherwise declared.<sup>2</sup>

## § 2. The Right of the Supreme Court to Hold Void Unconstitutional Acts of Congress.

The exercise by the Supreme Court of the United States of the right or power to hold void acts of Congress which it deems not warranted by the Constitution has been, at times, denounced as a usurpation upon its part. Although there is no substantial basis for this claim, the fact that it has been made makes it necessary to consider it at least briefly.<sup>3</sup>

## § 3. *Marbury v. Madison*.

Considering the transcendent importance of the doctrine as to the power of the courts to hold invalid unconstitutional legislative acts of their own governments, it is unfortunate that the doctrine was not expressly stated in the United States Constitution and doubly unfortunate that when, in the case of *Marbury v. Madison*,<sup>4</sup> the doctrine first found formal and explicit statement and application by the Supreme Court of the United States, Chief Justice Marshall, in his opinion rendered in that case, should have disposed of the matter in such a summary and unsatisfactory manner.

In this case the court held invalid that provision of the Judiciary Act of 1789 which purported to give original jurisdiction to the Supreme Court to issue writs of mandamus to public officers of the United States. Being of opinion that the Constitution did not give to Congress authority to grant this authority, the court, speaking through Marshall, employed the following reasoning in support of the position that no legal force or

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<sup>2</sup> "The distinction between the United States Constitution and our [New York] Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." *People v. Flagg* (46 N. Y. 401).

"That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question." *R. R. Co. v. Otoe* (16 Wall. 667).

<sup>3</sup> A considerable literature upon this topic exists. The most comprehensive discussion of it is probably Haines' *The American Doctrine of Judicial Supremacy*, 1914. For an excellent discussion and defence of this judicial power, see Charles Warren's *Congress, the Constitution and the Supreme Court*.

<sup>4</sup> 1 Cr. 137.



effect should be given to that statutory provision: "The question whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And, as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. . . . It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a supreme paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. . . . If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution as superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply." <sup>5</sup>

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<sup>5</sup> The reasoning of Webster and Kent is substantially the same. Webster says: "The Constitution being the supreme law, it follows of course, that every act of the legislature

#### § 4. The Judiciary Not Necessarily the Final Interpreter in All Cases of a Written Constitution.

The foregoing reasoning of Marshall is by no means convincing. In every government operating under a written constitution the function of finally determining its meaning must be located somewhere, but it does not follow that this function must necessarily be exercised by the courts. For the fact is that in nearly all countries which possess written constitutions, except the United States, the legislatures are empowered to determine for themselves, without judicial or other interference, the extent of their constitutional powers. It is true that, at the time Marshall rendered his opinion, these other written constitutions did not exist, but the fact that this constitutional practice has since existed and now exists, makes it evident that the doctrine of judicial supremacy does not necessarily find application in the operation of a government that derives its powers from a written constitution.

This being so, the possession by the courts of the right to determine, in last resort, not only their own constitutional powers but those of the other organs of government, must be established, if established at all, by the intentions of those who framed and adopted the Constitution which serves as the fundamental instrument of government. If this intention

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contrary to the law must be void. But who shall decide this question? Shall the legislature itself decide it? If so, then the Constitution ceases to be legal and becomes only a moral restraint for the legislature. If they, and they only, are to judge whether their acts be conformable to the Constitution, then the Constitution is advisory and accessory only, not legally binding; because, if the construction of it rest wholly with them, their discretion, in particular cases, may be in favor of very erroneous constructions. Hence the courts of law, necessarily, when the case arises, must decide upon the validity of particular acts." Webster, *Works*, Vol. III, 30.

Kent, in his *Commentaries*, says: "The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power contrary to the true intent and meaning of the Constitution, is absolutely null and void. The judiciary department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into it, and regard it as a permanent law. It would be rendering the power of the agent greater than that of his principal and be declaring that the will of only one concurrent and co-ordinate department of the subordinate authorities under the Constitution was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government, and the fundamental laws on which it rested. The attempt to impose restraints upon the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them." Chapter XX.

is not clearly declared, one way or the other, the force of the words that are employed must be interpreted in the light of pertinent extrinsic evidence, such as the discussions attending the drafting and adoption of the Constitution, and the general understanding of the people as shown in their previous and contemporaneous practice in the premises.

Approaching, then, from this point of view, the problem as presented in the United States, the first question is as to what light is thrown upon it by the words of the Constitution itself. As to this Marshall in his opinion in *Marbury v. Madison* said: "The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained." After quoting certain prohibitions of the Constitution upon legislative action, Marshall continued: "From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? . . . It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

It can hardly be said that this reasoning of Marshall is convincing, for throughout there runs the premise, which we have seen to be an unwarranted one, that there is something in the very nature of a written constitution that necessitates the vesting of its final interpretation in the judiciary.<sup>6</sup> That this reasoning is not convincing was conspicuously

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<sup>6</sup> Professor Thayer in his *brief life of Marshall* (p. 96) commenting upon the opinion in *Marbury v. Madison*, says: "The reasoning is mainly that of Hamilton in his short essay of a few years before in the *Federalist*. The short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of *McCulloch v. Maryland*, *Cohens v. Virginia*, and other great cases; and this treatment is much to be regretted. Absolutely settled as the doctrine is today, and sound as it is when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations—such too as affect today the proper administration of this extremely important power—which are not touched by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson, afterwards

shown in the elaborately argued dissent from it by Chief Justice Gibson of Pennsylvania in the opinion which he filed, in 1825, in the case of *Eakin v. Raub*,<sup>7</sup> and by echoes of this dissent which have continued to appear down to the present time in the public press. The doctrine itself, has, however, become an established one in American jurisprudence, and is now never questioned by the courts. The question, then, whether or not the Supreme Court, in *Marbury v. Madison* arrogated to itself a power which it did not properly possess may be left to the historian to determine. Those who wish to pursue the subject upon its logical or purely abstract jurisprudential side need not go beyond the reasoning of Chief Justice Gibson.<sup>8</sup> Those who wish to make themselves familiar with the evidence, extrinsic to the constitution in support of the position that the framers of that instrument intended the courts to exercise the power, which, since the decision of *Marbury v. Madison*, they have continued to exercise, may consult the literature which has been earlier cited.<sup>9</sup> The author of this treatise feels justified, however, in saying that, in his opinion, the records of the Convention which framed the Constitution clearly show that it was expected that the courts would exercise a "judicial veto" upon the attempts of coördinate legislative bodies to overstep the limits of their constitutional competence, and that, prior to the time when the United States Constitution was drafted and adopted, courts in several of the States had, in fact, exercised this power.<sup>10</sup>

At the time *Marbury v. Madison* was decided, the seal of secrecy had not been removed from the records of the Constitutional Convention of 1787, and, therefore, Marshall could not use them to strengthen his argument in that case, but he might have shown, as historians and jurists have since shown, that the doctrine that to the courts belong in the last

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Chief Justice of Pennsylvania, [*vide. Eakin v. Raub*, 12 Serg. and Rawle, 330], and many other strong, learned, and thoughtful men; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written Constitution what does not exist in any one of the written Constitutions of Europe. It does not remark the grave distinction between the power of disregarding the act of a co-ordinate department, and the action of a Federal court in dealing thus with the legislation of the local States. . . . So far as any necessary conclusion is concerned, it might fairly have been said with us, as it is said in Europe, that the real question in these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal."

<sup>7</sup> 12 Serg. and Rawle, 330.

<sup>8</sup> It is of interest to note that in 1845, Chief Justice Gibson, when, in argument, his opinion in *Eakin v. Raub* was referred to, said: "I have changed my opinion, for two reasons. The late [Pennsylvanian Constitutional] Convention, by their silence, sanctioned the pretensions of the courts to deal freely with acts of the legislature; and from experience of the necessity of the case." *Norris v. Clymer* (2 Penn. St. 281).

<sup>9</sup> Page 3, footnote 3.

<sup>10</sup> With reference, of course, to acts of the State legislatures which were deemed to be in conflict with their respective State Constitutions or Charters.

instance the right to refuse recognition and enforcement to legislative acts which they deem unconstitutional, had, before the adoption of the Federal Constitution, found considerable lodgement in American legal thought and practice. Moreover, the United States Supreme Court, upon several occasions previous to the decision of *Marbury v. Madison*, had indicated, without arousing dissent, that, should the necessity arise, it would decline to recognize as valid acts of Congress which it might find to be in conflict with the Constitution.<sup>11</sup> Therefore, it may fairly be said that when the framers of the Constitution provided that the Federal judicial power should extend to all cases, in law and equity, arising under the Constitution, the laws and treaties of the United States, it was intended, and by those who adopted the Constitution was understood to be intended, that the Federal courts should have the power which, in *Marbury v. Madison*, the Supreme Court declared them to have.<sup>12</sup>

Furthermore, it is significant that the first Congress of the United States in the twenty-fifth section of the Judiciary Act of 1789, clearly recognized the constitutional right of the Supreme Court to question the validity of an act of Congress. This section provided that "a final judgment . . . in the highest court of a State . . . where is drawn in question the validity of a treaty or a statute of the United States, and the decision is against their validity . . . may be reexamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

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<sup>11</sup> In *Ware v. Hylton* (3 Dall. 199) a case decided in 1798, Justice Iredell said: "There is no doubt that an act of Parliament in Great Britain would bind in its own country every possible case in which the legislature thought proper to act. . . . In this country, thank God, a less arbitrary principle prevails. The power of the legislature is limited, of the State legislatures by their own constitutions and that of the United States; of the legislature of the Union by the Constitution of the Union. Beyond these limitations, I have no doubt their acts are void."

In *Calder v. Bull* (3 Dall. 386) decided in 1798, Justice Iredell was still more explicit as to the province of the courts in the premises. He said: "If any act of Congress, or of the legislature of a State, violates those constitutional provisions, it is unquestionably void . . . they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act."

<sup>12</sup> Whether or not the State courts should exercise a similar power with reference to the acts of their State legislatures was, of course, a matter for the people of each State to determine. In fact, the doctrine of *Marbury v. Madison* was adopted, and has since been consistently maintained by every State of the Union.

The provision of Article VI, Par. 2, of the Federal Constitution that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding," has no pertinency to the question of the power of the courts to question the validity of acts of Congress. For, evidently, the sole purpose of this provision was to establish the supremacy of Federal over State law.

**§ 5. When Holding Laws Invalid Courts Do Not Defeat the Real Will of the People.**

It has sometimes been argued that in declaring unconstitutional, and therefore void, the enactment of a legislative body, a court defeats the will of the people as expressed through their mouthpiece, the legislature. In truth, however, what is done is this: The people, acting solemnly and deliberately in their sovereign capacity, declare that certain matters shall be determined in a certain way. These matters, because of their great and fundamental importance, they reduce to definite written form, and declare they shall not be changed except in a particular manner. In addition to this they go on to say, in substance, that so decided is their will, and so maturely formed their judgment, upon these matters, any act of their own representatives in legislature inconsistent therewith, is not to be taken as expressing their true will. Therefore, when the courts declare void legislative acts inconsistent with constitutional provisions, the judges are giving effect to the real will of the people as they have previously solemnly declared it. Thus, "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."<sup>13</sup>

It may indeed be true that particular laws which are held unconstitutional by the courts express, as detached propositions, the wishes of the people. But, viewed in connection with the entire constitutional scheme of government, they do not; for the very existence of the Constitution is founded upon the conviction that, as a general proposition, it is better that the government should be restrained by established constitutional provisions, even though, in particular instances, the instant wishes of the people are defeated. "It is because our people care more for their constitution than for any single law, enacted by the legislature," says President Lowell, "that constitutional government is possible among us. So long as such feeling continues, our Constitution and the power of the courts will remain unimpaired."<sup>14</sup>

**§ 6. Courts Do Not "Nullify" Laws.**

The doctrine that an unconstitutional law is void is often stated as a deduction from the premise that constitutional law is a superior kind of law to which statute law of inferior rank is obliged to yield. Speaking in all strictness, however, this is not the case, for the unconstitutional statute

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<sup>13</sup> *Lindsay v. Commissioners* (2 Ray, 38, 61).

<sup>14</sup> *Essays on Government*, p. 128.

is not law at all, whatever its form or however solemnly enacted and promulgated.

There are not and cannot be degrees of legal validity. Any given rule of conduct or definition of a right either is or is not law. When, therefore, we describe any particular measure as an unconstitutional law, and therefore void, we are, in fact, strictly speaking, guilty of a contradiction of terms, for if it is unconstitutional it is not a law at all; or, if it is a law, it cannot be unconstitutional. Thus, when any particular so-called law is declared unconstitutional by a competent court of last resort, the measure in question is not "annulled," but simply declared never to have been law at all, never to have been, in fact, anything more than a futile attempt at legislation on the part of the legislature enacting it. This is a very important point, for did the decision of the court operate as a nullification the effect would be simply to hold that the law should cease to be valid from and after the time such decision was rendered, whereas, in fact, the effect is to declare that the law, never having had any legal force, no legal rights or liabilities can be founded upon it. In *Norton v. Shelby Co.*,<sup>15</sup> Mr. Justice Field says: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The doctrine that the judicial declaration of the unconstitutionality of a statute has not the effect of a veto or nullification or abrogation of the statute so as, in effect, to strike it from the statute books, is excellently stated by the court of West Virginia in *Shepherd v. Wheeling*.<sup>16</sup> The court says:

"[The court] does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no application. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does not repeal . . . the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the case before it."

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<sup>15</sup> 118 U. S. 425.

<sup>16</sup> 30 W. Va. 479.

**§ 7. Effect of Subsequent Grant of Legislative Power.**

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without reënactment, if later, by constitutional amendment, the necessary legislative power is granted. "An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted."<sup>17</sup>

However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the act does not need to be reënacted in order to be enforced, if this cause of its unconstitutionality is removed.<sup>18</sup>

Also, as will later appear, a statute, constitutional at the time of its enactment, may, because of a change of circumstances, become, in its application to those circumstances, unconstitutional. Thus a legislatively fixed railway rate, reasonable at the time, may later become so unreasonable as to be confiscatory in its effect and therefore invalid as a denial of due process of law.

**§ 8. Effect of an Unconstitutional Statute.**

The statement of Justice Field which has been quoted, that a statute declared unconstitutional is as though it never existed, while in principle true, needs, in fact, to be somewhat qualified, since there are circumstances under which legal rights or obligations or consequences are attached to a legislative enactment which is later held to be unconstitutional. In other words, the retroactive force of the judicial pronouncement as to this unconstitutionality is not complete.<sup>19</sup>

In accordance with the general doctrine declared in *Norton v. Shelby Co.*, and repeated in other cases,<sup>20</sup> some State courts have held that one convicted under an unconstitutional statute is entitled to have his conviction reversed even though he pleaded guilty in the trial court, and the statute in question related only to a matter of practice or procedure and

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<sup>17</sup> *Newberry v. United States* (256 U. S. 232). Some of the State courts have declared a contrary doctrine. See 38 L. R. A. (N. S.) 77, note.

<sup>18</sup> *In re Rahrer* (140 U. S. 545); *Pierce v. Pierce* (46 Ind. 86); *McCollum v. McConaughy* (141 Ia. 172); *State of Iowa v. O'Neil* (147 Ia. 513).

<sup>19</sup> As to this see the able article of Professor O. P. Field, "Effect of an Unconstitutional Statute," in 1 *Indiana Law Journal*, p. 1. This article has served as the basis for the text of the present section.

<sup>20</sup> *Chicago, Indianapolis and Louisville Ry. v. Hackett* (227 U. S. 559); *Louisiana v. Pillsbury* (15 Otto, 287).



not to the substance of the offence charged against him.<sup>21</sup> And the United States Supreme Court has declared the same doctrine with regard to persons convicted under unconstitutional statutes either in the State courts or in the inferior Federal courts.<sup>22</sup>

This doctrine, however, does not necessarily cover the case of a person convicted under a law held, in his case, to have been valid, but later, in another case, held to be void. The author does not know of an exact instance in which this has occurred, but it may be that, in such a case, a person serving a term of imprisonment, or having paid a fine to the State, would have no other legal relief than an appeal to the executive for a pardon, or to the legislature for a refund to him of the fine he may have paid. In other words, the fact that the law under which he was convicted has been declared void, and, therefore, as a logical proposition, has never had any force, cannot operate to reverse the final judgment of the court which has convicted him, and it might be that, if he should obtain a writ of habeas corpus the return would be that he was held under a final judgment of a competent court. But see 39 L. R. A. 449.

The general doctrine that no legal rights or obligations can accrue under an unconstitutional law is applied in civil as well as criminal cases. However, in the case of taxes levied and collected under statutes later held to be unconstitutional, the taxpayer cannot recover unless he protested the payment at the time made. This, however, is a special doctrine applicable only in the case of taxes paid to the State. Thus, in transactions between private individuals, moneys paid under or in pursuance of a statute later held to be unconstitutional, may be recovered, or release from other undertakings entered into obtained. Bonds issued by the State as well as by municipal corporations under an unconstitutional statute are held void even though in the hands of innocent purchasers, unless, as will elsewhere be shown, the purchase has been made subsequent to, and in reliance upon, an earlier holding of the highest court of the State that the bonds or other securities had been constitutionally issued. This situation arose in *Gelpeke v. Dubuque*<sup>23</sup> and in other cases affirming the doctrine of that case. These cases are particularly discussed in the present treatise in the chapter dealing with "Obligation of Contracts" provision of the Constitution.<sup>24</sup>

Although an unconstitutional statute cannot create legal rights or obligations, it has been held by the Supreme Court that where individuals have in good faith acted to their detriment under a statute believed by them to be valid, but later held to be invalid, a moral or equitable obliga-

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<sup>21</sup> *Norwood v. State* (Miss.) (101 So. 386); *Brewer v. State* (Ala.) (39 So. 927); *State v. Green* (Fla.) (102 So. 739).

<sup>22</sup> *Ex parte Siebold* (100 U. S. 371).

<sup>23</sup> 1 Wall. 175.

<sup>24</sup> However, the well known doctrine of estoppel by recital should be noted.

tion upon the part of the State may be created sufficient to support an appropriation of public moneys for their indemnification.<sup>25</sup>

Although, as has been seen, an unconstitutional statute must, from the strictly logical point of view, be regarded as never having had any potency to create legal rights or obligations, practical considerations have led some of the State courts to ascribe a certain validity to acts committed by persons exercising in good faith powers conferred by acts which are later held to be unconstitutional. This is in accordance with the general principles of law which govern *de facto* officers or corporations.<sup>26</sup>

There have also been cases in which the existence upon the statute books of a measure authorizing action that has been taken, though later held to be unconstitutional, has been held to relieve from civil liability persons acting in good faith upon the assumption that the act was valid.<sup>27</sup> In other cases, however, persons so acting have been held civilly liable under the doctrine that everyone is presumed to know the law.<sup>28</sup> In *Flaucher v. Camden*,<sup>29</sup> a private citizen was held criminally liable for an act assumed by him to be legal, because of a statute, which statute was later declared by the court to be unconstitutional.

#### § 9. Statutes First Held Valid and Later Invalid, and Vice Versa.

There have been not a few instances in which statutes have been held invalid, and later, when again brought before the courts, held valid. *Vice versa*, there have been instances in which statutes originally held valid have later been held invalid. In these cases the question has been raised whether the effect of the later decisions should be held in the one case to validate all acts under the statutes in question from the time of their enactment; or, in the other case, to invalidate all such acts. Logically it would seem that such should be deemed to be the effect of such later or last decisions, and such, generally speaking, but not uniformly, is the established doctrine.

An interesting case in which the court refused to apply this doctrine is that of *State of Iowa v. O'Neil*.<sup>30</sup> In this case a law of the State prohibiting the sale of intoxicating liquors had been held unconstitutional by the Supreme Court of the State upon the ground that it was in violation of the United States Constitution. However, in view of a subsequent decision of the United States Supreme Court upholding a similar statute of

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<sup>25</sup> *U. S. v. Realty Co.* (163 U. S. 427). As to this case, see *post*, § 106.

<sup>26</sup> *Cf. Nabel v. Bosworth* (198 Ky. 847); *Lang v. Mayor of Bayonne* (74 N. J. L. 455).

<sup>27</sup> *Henke v. McCord* (55 Ia. 378); *Shafford v. Brown* (49 Wash. 307).

<sup>28</sup> *Sumner v. Beeler* (50 Ind. 341); *Kelly v. Bemis* (4 Gray, 83).

<sup>29</sup> 56 N. J. L. 248.

<sup>30</sup> 147 Ia. 513, 33 L. R. A. (n. s.) 788.

another State, the Iowa court, in a later case, reversed its earlier ruling and held the act constitutional. In the instant case, O'Neil was charged with a violation of the act committed subsequent to the decision of the Iowa court that the act was void, and subsequent to the decision of the United States Supreme Court referred to,<sup>31</sup> but prior to decision of the Iowa court holding the statute valid. Under these circumstances the court held that the accused could not be punished under the act. The court pointed out that, at the time the act charged against O'Neil was committed, the Iowa law had been held void, and that he was in no wise obligated to infer from the decision of the Federal Supreme Court, that this holding was incorrect and would be reversed. The court held that the maxim that "ignorance of the law excuses no one," could not be extended to mean that one must, at his peril, know that a statute which has been held invalid will, in fact, be later held to be valid. After referring to the necessity of criminal intent in the determination of the criminality of an act even under statutory definition, the court said: "As between conflicting rights, we might well refuse to allow any impairment of so well settled a principle [as that of ignorance of the law excuses no one], and hold that parties act at their peril as to what the law shall be decided to be. But, as already indicated, in a criminal case, there is no such imperative obligation, for after all the punishment of crime is a matter of public concern only, and we think that it would strike any reasonable and fair person as manifestly unjust that one should be adjudged criminal in having done an act not morally wrong, but only wrong because prohibited by statute, that is, an act *malum prohibitum*, and not *malum in se*, relying upon the decisions of the highest court in the State holding such statute to be wholly invalid because in excess of the power of the legislature to enact it. . . . A statute unconstitutional properly remains on the statute books as a part of the written law, but those who are bound to obey the law may, we think, reasonably take into account the decisions rendered by the courts in the exercise of their peculiar function of passing upon the constitutionality of the statutes in determining what the law of the State really is. . . . We think the real question as to the guilt of the defendant is to be settled by referring to the doctrine of criminal intent which has always been held to be of the essence of a crime. . . . An exception to the rule that every one is required to know the law is justified, we believe, when, as to the validity of a statute on constitutional grounds, a person has relied upon the expressed decisions of the highest court in his State." <sup>32</sup>

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<sup>31</sup> Delamater v. S. Dakota (205 U. S. 93).

<sup>32</sup> The concurring opinions of Justices Deemer and Weaver in this case may be read with profit. Also may be examined the editorial note to State v. O'Neil, in 33 L. R. A. (n. s.) 788.

**§ 10. Constitutionality of Laws Often Determined on a Basis of Objective Facts, Rather Than of Grammatical or Logical Construction of Constitutional Provisions.**

It is worth noting that the question as to the validity of a law often depends solely upon the opinion of the courts as to facts which are assumed or declared to exist by the enacting legislature. This occurs, for example, when the courts are called upon to determine whether a condemnation of private property authorized by the legislature is for a public purpose, or whether a regulation of public service is a reasonable one, or, if a matter of rate establishment is involved, whether it is so low as to be confiscatory in character, and therefore to be a denial of due process of law, or whether a given occupation is so "affected with public interest" as to be subject to public regulation, or, in general, whether a procedure affecting the private rights of individuals or corporations is such as to satisfy the requirements of due process of law, or whether regulations legislatively sanctioned come fairly within the police power of the State to guard its citizens against fraud, immorality, or danger to life or health. The extent to which courts determine the constitutionality of legislative enactments, or administrative processes upon a basis of objective fact, rather than a construction of the meaning of constitutional provisions—regarding which there is usually no dispute—will especially appear in the chapters dealing with "Due Process of Law" and the "Police Power."

**§ 11. The Constitutionality of a Law May Depend Upon the Special Facts of a Particular Case.**

The question as to the constitutionality of law does not, in all cases, go to the essential validity of the law, that is, as applicable to any or all conditions, but may depend upon the particular facts to which it is sought to be applied. Thus, in *Poindexter v. Greenhow*,<sup>33</sup> the court said: "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance marks a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the Constitution of the United States."<sup>34</sup> Thus, the cases are numerous

<sup>33</sup> 114 U. S. 270.

<sup>34</sup> In *Kansas City S. Ry. Co. v. Anderson*, 233 U. S. 325, the court said: "It is contended, however, that the statute having been declared unconstitutional as applied to one state of facts that properly raises the question, it is void for all purposes. The contention is based on the assumption that we decided the statute in the *Wynne* case

in which the Supreme Court, in holding particular statutes unconstitutional, has qualified or explained this holding by declaring that the statutes "as construed and applied" are thus to be deemed unconstitutional.

A striking case in which a statute was held unconstitutional under the conditions to which it was sought to be applied, but yet, in general, valid so as to operate to repeal a previous statute was that of *Ex parte Medley*.<sup>35</sup> In this case the petitioner in habeas corpus proceedings had been convicted of murder in the first degree, and, while awaiting execution, a State statute was passed which changed the treatment to be accorded to prisoners awaiting execution and altered the fixing by the warden of the penitentiary of the exact day and hour for the execution. These new provisions the Supreme Court held increased the mental anxiety of the prisoner and therefore amounted to an increase in his punishment beyond that provided for by law at the time of the commission of his crime, and hence was *ex post facto* in character. However, the court held that the statute operated to repeal the statute under which the petitioner was being held, and that, therefore, he was to be freed from custody. The court said: "We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not."

In *Chastleton Corporation v. Sinclair* <sup>36</sup> the court said: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." <sup>37</sup>

## § 12. Who May Question the Constitutionality of a Law.

All governmental acts, executive, legislative and judicial, to be legally valid, must meet the requirements of the Constitution. Whether or not they do so is for the courts, in the last resort, to determine.

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(*St. L. S. R. Co. v. Wynne*, 224 U. S. 354) to be unconstitutional; but the ground of the decision was, as we have seen that the statute was there applied to a case where the plaintiff in the action had recovered less than he demanded before the suit. We declined to extend our opinion to a case where the amount of the judgment corresponded to the demand; in other words, declined to pronounce the act entirely unconstitutional."

<sup>35</sup> 134 U. S. 160. See also *Yek Wo v. Hopkins*, 118 U. S. 356.

<sup>36</sup> 264 U. S. 543.

<sup>37</sup> Citing: *Perrin v. United States*, 232 U. S. 478.

For further illustrations of cases in which laws have been held valid or invalid according to the facts to which they are applied, see the opinion in *Hamilton v. Kentucky Distilleries Co.* (251 U. S. 146).

This is an obligation that rests upon every court, high or low, State or Federal. Reciprocally, the right to raise the question of constitutionality is possessed by every litigant. A denial to a litigant of such a right would be itself an unconstitutional act—a denial of due process of law.<sup>38</sup>

Every question as to the constitutionality of a governmental act, State or Federal, legislative, executive or judicial, as tested by the United States Constitution can be brought by original suit or by appeal or by *certiorari* to the Supreme Court of the United States.<sup>39</sup>

It is, then, the right of any litigant in any judicial proceeding to raise the question as to the constitutional basis of a right, privilege or immunity that has been asserted, and which, if allowed, will operate adversely to his own interests. Furthermore, the private individual may refuse obedience to an executive or judicial order, or to a legislative provision, upon the ground that it is not constitutional. This, however, he does at his own risk, since, if the order or act in question be finally held constitutional, he is subject to punishment for such refusal. In order that he may have this opportunity of testing in the courts the constitutionality of a law or other government action, the Supreme Court has held in a number of well-considered cases that a legislature may not attach to a law such unreasonably severe penalties for its violation that no one will dare to take the risk of incurring them in order to secure a judicial determination as to the validity of the law itself.<sup>40</sup>

The right of a public official, charged with the execution of a law, to refuse to act upon the ground that the law is unconstitutional is not as clear as it is in the case of the private individual who is called upon to obey the law. As a matter of general public policy, however, it would seem that a public functionary, even if willing to assume the risk of impeachment, or of removal from office, or of the civil or criminal consequences that might follow, should not refuse to execute a law which he deems unconstitutional, except where the consequences of enforcing the law will be very serious and irremediable, or, and especially, when the only way in which a case can be made up for the judicial determination of the validity of the law is by a refusal upon his part to act under the law. In a later chapter,<sup>41</sup> the special application of this principle to the President of the United States will be considered.

As to the right of administrative officials, in actions to enforce the performance by them of statutory ministerial duties, to question the constitutionality of the statutes imposing the duties, American courts are in conflict. Some courts have denied the right upon the ground either of public convenience, or that the official has not a sufficient personal interest in the matter; other courts have deemed it expedient, from the

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<sup>38</sup> See *post*, Chapter XCII.

<sup>39</sup> See *post*, Chapter LXXI.

<sup>40</sup> See *post*, § 1143.

<sup>41</sup> § 983.

public point of view, that he should be permitted to raise the issue, and have called attention to the fact of his personal liability in case it should be held that his refusal was not justified. *Corpus Juris*, says: "The better doctrine, supported by an increasing weight of authority, is that a mere subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of his complying with a statute, will not be allowed to question its constitutionality; but that the constitutionality of a statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office, or otherwise render himself liable, by acting under a void statute."<sup>42</sup>

In some of the States of the Union, a ministerial officer is not permitted to allege the unconstitutionality of a statute when defending against mandamus proceedings. In other States the contrary view has been held.<sup>43</sup>

The result is that, in many cases, a public official has to act at his peril. He becomes liable if he acts under a statute which is later held to be unconstitutional; and he is equally liable if he refuses to act under a law which he believes to be unconstitutional but which is afterwards held to be valid; and, as has been seen, in some cases he is not allowed to refuse to act even though he believes, and correctly as may later develop, that the statute directing him to act is unconstitutional. However, the Supreme Court of the United States, while recognizing the practical objections to permitting ministerial officials to question the validity of statutes directing action upon their part, seems to have recognized such a right upon their part. In *Little Rock, etc., Ry. v. Worthen*<sup>44</sup> the court said: "It may not be a wise thing, as a rule, for subordinate or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public, but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not law; it binds no one and protects no one." It is, however, to be observed that, in this particular case, before refusing to follow the

<sup>42</sup> *Op. cit.*, vol. XII, p. 765, sec. 183. See also elaborate note in 47 L. R. A. 512.

<sup>43</sup> As to this conflict of views see the note in 47 L. R. A. 512. The writer of this note, by way of conclusion, says: "From the above decisions it is apparent that there is no theory which will reconcile all the conflict. There is running through the decisions, however, a thread which would furnish a logical and satisfactory rule upon the question if finally adopted. That is that statutes are generally presumed valid, and ministerial officers must treat them as such until their validity is established, but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a mandamus proceeding brought to enforce it. In other cases he must perform his duty as the statute requires, and leave those whose rights are affected by it to take steps to annul it."

<sup>44</sup> 120 U. S. 97.

statute, the administrative official had obtained an opinion of the Attorney-General of the State that the act in question was unconstitutional. Indeed, as declared by the Supreme Court of the United States, "the conflict between the Constitution and the statute was obvious." It may be, then, that, in a less extreme case, the Supreme Court would not approve the refusal of a ministerial administrative official to act under a statute which he deems to be unconstitutional.

With reference to State officials and State law, the Supreme Court of the United States has held that it will hold itself bound by the practice of the courts of the State concerned. Thus, in *Smith v. Indiana*,<sup>45</sup> the Supreme Court said: "Although there are many authorities to the effect that a ministerial officer charged by law with the duty of enforcing a certain statute cannot refuse to perform his plain duty thereunder upon the ground that in his opinion, it is repugnant to the Constitution, it is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it, has often been assumed and sometimes directly decided to exist. In any event it is a purely local question, and seems to have been treated so by this court in *Huntington v. Worthen*."<sup>46</sup>

It is generally held that an individual may not, on the ground that, in his opinion, a statute is unconstitutional forcibly resist its enforcement by an officer. This contention he may set up only in legal proceedings for relief or for civil damages for the injury done him under the statute.<sup>47</sup>

### § 13. Substantial Interests Must Be Involved.

The general rule is that courts will not pass upon the constitutionality of laws or other official acts except in suits duly brought before them, and at the instance of parties whose material interests will be, or have been, adversely affected by the enforcement of the laws or the recognition of the validity of the executive or judicial acts which are complained of.<sup>48</sup> Thus it has been held that as to acts claimed to be unconstitutional as in denial of the equal protection of the laws, only those persons may raise the point who come within the class or classes of persons discriminated against.<sup>49</sup>

It thus sometimes happens that an unconstitutional legislative act is enforced for many years before its invalidity is finally determined in the courts. It also happens in some cases that it is impossible to test the constitutionality of a legislative act because no parties plaintiff or com-

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<sup>45</sup> 191 U. S. 139.

<sup>46</sup> 120 U. S. 97.

<sup>47</sup> *State v. Skinner* (86 So. Rep. 716).

<sup>48</sup> *Yazoo Mississippi R. Co. v. Jackson Vinegar Co.* (226 U. S. 217); *Jeffrey Mfg. Co. v. Blagg* (235 U. S. 571).

<sup>49</sup> See authorities cited in 12 *Corpus Juris*, 760, note 57.



plainant can be found willing to institute suit, whose interests will be substantially prejudiced by the enforcement of the act in question.

A recent and especially luminous statement of the circumstances under which the courts will exercise their power to hold invalid, because unconstitutional, the acts of a coördinate legislature, is that given by the Supreme Court in *Massachusetts v. Mellon*.<sup>50</sup> The court says: "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

In the foregoing case the State sought to enjoin the payment of sums of money from the Federal Treasury by the Secretary of the Treasury in pursuance of the so-called Maternity Act of Congress of November 23, 1921, upon the ground that the act dealt with matters that were exclusively within State control. This act, it is to be observed, laid upon the States no pecuniary obligations except with their own approval. The court, dismissing the action for want of jurisdiction, said: "We are called upon to adjudicate, not rights of person or property, nor rights of dominion over physical domain, nor quasi-sovereign rights actually invaded or threatened, but abstract questions of political power of sovereignty, of government. No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute." Nor, the court went on to say, could the suit be maintained by the State as *parens patriæ* in behalf of its citizens as taxpayers. As to this the court said: "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a State may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the

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<sup>50</sup> 262 U. S. 447.

United States. It cannot be conceded that a State, as *parens patriæ*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens,<sup>51</sup> it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriæ*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

In *Braxton County Court v. West Virginia*<sup>52</sup> the court declared: "The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the State court sustaining the act, and the interest must be of a personal, and not of an official nature."<sup>53</sup>

#### § 14. Taxpayers' Actions.

In *Frothingham v. Mellon*<sup>54</sup> the plaintiff had sought, as a taxpayer, to enjoin the execution of the so-called Maternity Act of Congress. Such taxpayers' actions to enjoin the execution of municipal appropriation acts have been repeatedly entertained by the courts,<sup>55</sup> but, until this case, the right of a taxpayer to enjoin the execution of a Federal appropriation act had not been passed upon by the Supreme Court, except *sub silentio*. Distinguishing the status of a citizen with reference to a Federal appropriation act, from his status with reference to municipal acts, the court said:

"The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of State cases and is the rule of this court. *Crampton v. Zabriskie* (101 U. S. 601). Nevertheless, there are decisions to the contrary. See, for example, *Miller v. Grandy* (13 Mich. 540). The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 *Dillon, Municipal Corporations* (5th Ed.) § 1580 *et seq.* But the relation of a taxpayer of the United States to

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<sup>51</sup> *Missouri v. Illinois & Chicago District* (180 U. S. 208). See *post*, § 878.

<sup>52</sup> 208 U. S. 192.

<sup>53</sup> Citing *Clark v. Kansas City* (176 U. S. 114); *Lampasas v. Bell* (180 U. S. 276); *Smith v. Indiana* (191 U. S. 138).

<sup>54</sup> 262 U. S. 447.

<sup>55</sup> As to the right of the taxpayer to enjoin the execution of State appropriation acts, the decisions are conflicting, with the majority of them opposed to the right.

the Federal government is very different. His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

“The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.”

#### § 15. Arranged or Fabricated Suits.

It is not infrequently the case that a suit is arranged between parties expressly for the purpose of raising and thus determining the constitutionality of a law. No judicial exception to this practice is made, or can properly be made, when, in fact, interests of the parties raising the issue will be adversely and substantially affected by an enforcement of the act. But when this is not the fact, or if the case has been prosecuted in such a “friendly” manner that diligent effort has not been made to have all pertinent evidence introduced and analyzed, the courts will not, upon the evidence that has been adduced, attempt to determine whether the questioned law, if enforced in the premises, will operate unconstitutionally.

Thus in *Chicago and Grand Trunk Ry. Co. v. Wellman*,<sup>56</sup> in which it was charged by the plaintiff that certain rates fixed by the legislature were so unreasonably low as to be confiscatory in character and therefore to work, if enforced, a taking of property without due process of law, and therefore to be unconstitutional, the Supreme Court found that the judgment of the court below, which had been appealed from, had been based upon an agreed statement of facts which had precluded inquiry into many things which should have entered into the determination of the matter in controversy. The court said:

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<sup>56</sup> 143 U. S. 339.

"The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not, but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."<sup>57</sup>

In *Fairchild v. Hughes*,<sup>58</sup> suit was brought in equity by a private citizen to have the Secretary of State enjoined from proclaiming the ratification of the Nineteenth Amendment. The Supreme Court, affirming the decree of the court below dismissing the bill, said: "Plaintiff's alleged interest in the question submitted<sup>59</sup> is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case, within the meaning of section 2 of article 3 of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is 'brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.' . . . Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be

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<sup>57</sup> A conspicuous instance in which real interests of the parties were involved, and in which the court took jurisdiction, but which, as was well known, had been arranged in order to test the validity of the Federal Income Tax Law, was *Pollock v. Farmers' Loan and Trust Co.* (157 U.S. 158; 158 U.S. 601). Other similar cases, which probably were "moot" cases, but only in the sense that they had been arranged by the parties to them in order to obtain the judgment of the court as to the constitutionality of the statutes involved were *Hylton v. U.S.* (3 Dall. 171); *Fletcher v. Peck* (6 Cr. 37); and *Buchanan v. Warley* (245 U.S. 60). Cf. Professor E. S. Corwin's able article "Judicial Review in Action," in 74 *Univ. of Penn. Law Review*, 639, note 10.

<sup>58</sup> 258 U.S. 126.

<sup>59</sup> The plaintiff alleged that he was suing in behalf of other citizens of the United States, who were taxpayers and members of the American Constitutional League, a voluntary organization engaged in diffusing "knowledge as to the fundamental principles of the American Constitution." The bill charged that irremediable mischief would result from the promulgation of the ratification of the Amendment which, it was alleged, had not been constitutionally adopted.

not wasted. Obviously this general right does not entitle a private citizen to institute in the Federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid. Compare *Giles v. Harris* (189 U. S. 475); *Tyler v. Judges of Court of Registration* (179 U. S. 405)."

**§ 16. What Constitutes a "Case" or "Controversy" Arising Under the Constitution, Laws or Treaties of the United States.**

An important case in definition of what may be a "case" or "controversy" to which the judicial power of the United States extends, and in which the constitutionality of Federal statutes may be examined, is that of *Muskat v. United States*.<sup>60</sup> This case arose under an act of Congress which undertook to confer upon the Court of Claims, and, by appeal, upon the Supreme Court of the United States, jurisdiction to entertain suits against the United States which might be brought by certain named Cherokee Indians for themselves and others similarly situated, in order to determine the validity of certain acts of Congress. This enabling act the court held to be impotent for the purpose since it attempted to vest in the Federal courts a jurisdiction not embraced within the judicial power of the United States as provided for in Art. III of the Constitution. The court found that the purpose of the suit was wholly comprised in the determination of the validity of certain acts of Congress rather than the determination of material and specific rights of the plaintiffs, and, in this connection, called attention to the fact that the act of Congress under the terms of which the suit had been brought provided that, in case the court should deny the constitutional validity of the acts of Congress which were sought to be examined, the compensation of the attorneys for the plaintiffs should be paid out of funds in the Treasury of the United States belonging to the beneficiaries, and that the United States should be made a party to, and the Attorney General charged with the defence of, the suits. The court said: "The exercise of this, the most important and delicate duty of this court [to pass upon the constitutionality of acts of Congress] is not given to it as a body with revisionary power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law purporting to be enacted within constitutional power, but in fact beyond the power delegated to the legislative branch of the government. . . . It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legisla-

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<sup>60</sup> 219 U. S. 346.

tion, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question."

In its opinion the court reviewed earlier cases in which had been examined the question as to what constitutes a "case" or "controversy" within the meaning of the judicial power as granted by Article III of the Constitution. These cases will be considered in the present treatise in the chapter dealing with the Judicial Power of the United States.<sup>61</sup>

The bearing of *Muskrat v. United States* upon the constitutionality of statutes authorizing the courts to render "Declaratory Judgments" will be more fully discussed in the chapter dealing with the "Separation of Powers."<sup>62</sup>

#### § 17. Constitutionality of a Law Will Be Considered Only When Necessary for the Decision of the Case.

In recognition of the fact that the substitution of the opinion of a court for that of the enacting legislature as to the constitutionality of a questioned law is a serious matter, all American courts guide themselves by the self-set rule that they will not declare a law unconstitutional if the case in which the question is raised can be properly disposed of in some other way.<sup>63</sup>

In *Marbury v. Madison* the Supreme Court, although it declared that it had not jurisdiction of the case, went on to lay down the law applicable to the other points at issue, excuse for so doing being that the court felt itself obligated first to determine whether or not the mandamus asked for should issue, so that, if possible, it might dispose of the case without calling into question the constitutionality of the act of Congress granting the original jurisdiction under which the suit had been brought. Whether this was a sufficient excuse is doubtful. Jefferson was vehement in criticism of the action.<sup>64</sup>

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<sup>61</sup> See *post*, Chap. LXXI.

<sup>62</sup> See *post*, § 1067.

<sup>63</sup> See quotation already made (*ante*, § 1067) from *Chicago & Grand Trunk Ry. Co. v. Wellman* (143 U. S. 339). See also authorities cited in *Corpus Juris*, vol. XII, p. 780, sec. 211.

<sup>64</sup> The controversy as to whether or not the court was justified in considering and passing upon the merits of the case in *Marbury v. Madison* has continued to the present day. It is, however, interesting to note that, in the recent case of *Myers v. United States* (272 U. S. 52) the Supreme Court, speaking of the case of *Marbury v. Madison*,

It may be observed that it was not only in the case of *Marbury v. Madison* that Chief Justice Marshall showed a willingness to discuss matters which it was not absolutely necessary to discuss in order to reach the decision finally rendered by the court. Thus, in the great case of *Cohens v. Virginia*,<sup>65</sup> the case was decided upon the ground that the act of Congress which was involved did not and was not intended to cover the acts upon which the suit had been brought. Nevertheless, Marshall invited and then refuted in his opinion the various arguments which had been advanced by the counsel for Virginia with regard to whether the suit was one against the State and therefore barred by the Eleventh Amendment; whether a writ of error properly lay from the Supreme Court to the State court; and whether the act of Congress if construed to extend to acts committed in Virginia would be constitutional.<sup>66</sup> It was only after these points had been argued upon a motion to dismiss the case for want of jurisdiction that the case was heard upon its merits and decided as above indicated.

In the *Dred Scott* case the Supreme Court, after holding that the lower Federal courts from which the case had come by appeal had had no jurisdiction, went on to discuss the other points raised in the record before it. The propriety of this course was strenuously objected to by the minority justices. Taney's argument was that the plea to the jurisdiction that had been entered was not as to the jurisdiction of the Supreme Court, but as to that of the Circuit Court in which the suit had been begun, and that, therefore, the case being fairly before the Supreme Court, that tribunal might examine the whole record and correct any errors that might have been made by the courts below. "There can be no doubt of the jurisdiction of this court to reverse the judgment of a circuit court, and to reverse it for any error apparent in the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this too, whether there is any plea in abatement or not. The objection appears to have arisen from confounding writs of error to a State court, with writs of error to a Circuit Court of the United States. Undoubtedly, upon a writ of error to a State court, unless the

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said: "The rule [to show cause why a writ of mandamus should not issue] was discharged by the Supreme Court for the reason that the court had no jurisdiction in such a case to issue a writ of mandamus. The court had, therefore, nothing before it calling for a judgment upon the merits of the question of issuing the mandamus." And, a little later on in the same opinion: "However this may be, the whole statement [of the court in *Marbury v. Madison* that the writ in a proper case could issue] was certainly *obiter dictum* with reference to the judgment actually reached."

Cf. the article by Prof. A. C. McLaughlin, "*Marbury v. Madison Again*" in 14 *Am. Bar Association Journal*, 156.

<sup>65</sup> 6 Wh. 264.

<sup>66</sup> Cf. the discussion of this case by Professor E. S. Corwin in his article previously cited.

record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in the court. And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a State court and to a Circuit Court of the United States are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court to examine the whole case as presented by the record, and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment and remand the case. And certainly an error in remanding a judgment upon the merits in favor of either party, in a case in which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit."

Justice Curtis in his dissenting opinion argued that the foregoing had not in fact been the practice and declared doctrine of the Supreme Court, and said that the court especially should not have proceeded in the case to declare unconstitutional an act of Congress in violation of the principle that this will not be done when it is possible to render a judgment upon any other ground.<sup>67</sup>

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<sup>67</sup> The question as to the propriety of the court's consideration, in the *Dred Scott* case, of the questions in the case, after the jurisdiction of the lower Federal court had been denied, is a very fine one, and, for its full discussion would require more space than can be here spared for it. For an excellent defence of Taney's action in this respect see the article of Professor E. S. Corwin, "The *Dred Scott* Case in the Light of Contemporary Legal Doctrines," in 17 *American Historical Review*, 52. See also the article by H. H. Hagen, "The *Dred Scott* Decision," in 15 *Georgetown Law Journal*, 95. In this article Mr. Hagen points out that Chief Justice Taney was in the minority as regards the decision that a negro who had been a slave, or who was descended from slaves, could not become a citizen within the meaning of the Federal Constitution, and that, therefore, his opinion upon this point could not be said to be the judgment of the court. However, as Mr. Hagen points out, even if the court had held that a freed negro could not become a citizen of the United States and thus be entitled to bring the suit, it was still within the right of the Supreme Court to decide that, for an additional reason, the lower court had had no jurisdiction, because, in fact, Scott had not been freed and was still a slave, that is, not freed because, for one reason at least, the Missouri Compromise Act had been unconstitutional. As a matter of fact, as Mr. Hagen emphasizes, it was only on the contention that Scott was still a slave that a majority opinion on the jurisdictional point was obtained. As to the right, as established by precedent, of the court to vest its decision on two or more grounds, although any one of them would be sufficient to dispose of the case, Mr. Hagen refers to *Florida Central R. Co. v. Schutte* (103 U. S. 118); *Union Pac. R. Co. v. Mason City* (199 U. S. 160); *U. S. v. Chamberlain* (219 U. S. 250), and *Ex parte Young* (209 U. S. 123). In this last case the court referred to the fact that in *Reagan v. Farmers' Loan and Trust Co.* (154 U. S. 362), it had declared "that the objection of the Supreme Court was not tenable



**§ 18. Advisory Opinions.**<sup>68</sup>

In a number of the States of the American Union it is constitutionally provided that, upon request by the executive or the legislature, the judges of the highest court of the State shall give their opinion as to the constitutionality of proposed measures or actions submitted to them. In other States it is provided that these judges may suggest to the legislature measures for the improvement of the law. In general it may be said that these opinions thus obtained are purely advisory in character, and that they do not constitute judicial precedents to control the future judgments of even the courts that render them. This has been definitely declared in Massachusetts, New Hampshire, Rhode Island, Missouri (where the practice existed from 1865 to 1875) and Florida. In Maine and Colorado, however, these decisions have been held binding.<sup>69</sup> The Maine court said: "Various questions involving the true construction of the Constitution and statutes . . . arose, and the Governor called upon this court for its opinion on the questions propounded. The court was required by the Constitution to expound and construe the provisions of the Constitution and statutes involved. It gave full answers. The opinion of the court was thus obtained in one of the modes provided in the Constitution for an authoritative determination of 'important questions of law.' The law thus determined is the conclusive guide of the Governor and Council in the performance of their ministerial duties. Any action on their part . . . in violation of the Constitution and law thus declared is a usurpation of authority and must be held void."

Despite Maine and Colorado, the weight of precedent, as well as the better reason and wisdom, is in favor of holding such opinions merely advisory. Such decisions do not arise out of or relate to any particular facts or particular purpose which might explain or limit the generality of their statements. The judges have not necessarily had the benefit of the hearing of counsel, and there has been no argument before them.

The opinions of the Attorney-General of the United States resemble in their advisory character these opinions of judges.<sup>70</sup>

A number of instances have occurred in which judges in States, whose Constitutions have not given the legislature or executive this power to call for their opinions, have refused to give them when called upon to do so. Thus, in Minnesota<sup>71</sup> the court held unconstitutional an act which

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whether that jurisdiction was raised 'upon the provisions of the statute or upon the general jurisdiction of the court, existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States.'" "Each of these grounds," the court declared in the Young case, "is effective and both are of equal force."

<sup>68</sup> See elaborate note in Thayer's *Cases on Constitutional Law*, vol. I, pp. 175ff.

<sup>69</sup> 12 Colo. 466; 70 Maine, 503.

<sup>70</sup> See Langeluttig, *The Department of Justice of the United States*, Chap. XII.

<sup>71</sup> 10 Minn. 78.

provided that "either house may by resolution require the opinion of the Supreme Court or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court, or judges thereof, when so requested respectively to give such opinions in writing."

The Pennsylvania court, however, in a similar case, gave the requested opinion without comment.<sup>72</sup>

In 1920, the Supreme Court of Michigan declared unconstitutional a State statute providing for the giving by the courts of declaratory judgments.<sup>73</sup>

In several cases, justices have refused, even in those States where the power to call for an opinion is in the Constitution, to give an opinion upon questions which it was possible might afterward come before them for adjudication. Instances of this occurred several times in Missouri and once in Maine.

"New York originally not only gave her legislators a share in judicial power, but her judges a share in that of legislation. Her Constitution of 1777 provided for a council of revision, consisting of the Governor, the Chancellor, and the judges of the Supreme Court, to whom all bills which passed the Senate and Assembly should be presented for consideration; and that, if a majority of them should deem it improper that any such bill become a law, they should within ten days return it with their objections to the house in which it originated, which should enter the objections at large in its minutes, and proceed to reconsider the bill; and that it should not become a law unless repassed by a vote of two-thirds of the members of each house. For forty years this remained the law, and the Council of Revision contained from time to time judges of great ability, Chancellor Kent being one. During this period, 6590 bills in all were passed. One hundred and twenty-eight of them were returned by the Council with their objections, and only seventeen of these received the two-thirds necessary to reenact them."<sup>74</sup>

In the Constitutional Convention of 1787 it was proposed to give to the President and to Congress the right to ask opinions of the Supreme Court, but this proposal was not agreed to.<sup>75</sup> In 1793 President Washington, however, asked the opinion of the Supreme Court as to certain questions arising under Jay's Treaty. The court refused to answer upon the ground that it would act only in cases or controversies brought before them in due form. So, also, as elsewhere referred to, when Congress attempted, in 1792, to impose upon it the exercise of functions not judicial in character, and to be performed in a judicial manner, the court refused to act.<sup>76</sup>

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<sup>72</sup> 3 Binney, 595.

<sup>73</sup> *Anway v. Grand Rapids Ry. Co.* (179 N. W. Rep. 350).

<sup>74</sup> Quoted from Baldwin, *The American Judiciary*, p. 30.

<sup>75</sup> 5 Ell. Deb. 445.

<sup>76</sup> *Hayburn's Case* (2 Dall. 409). For a further discussion of this point, see *post*, § 1074.

**§ 19. Executive or Administrative Discretion: Political Questions.**

It is a principle adopted by all courts and with regard to all kinds of law that it does not fall within the judicial function to control the exercise of the discretionary powers which, by the Constitution or statutes, are vested in public officials.

Though, in general, the courts will not attempt to control the exercise by executive or administrative officials of the discretionary powers vested in them by the Constitution or laws passed in pursuance thereof, nevertheless if that discretion is exercised in such an arbitrary or unjust and discriminating manner as clearly to deny to individuals their right to the equal protection of the laws, or to due process of law, or any other constitutional right, the courts will intervene. Furthermore, the courts will hold unconstitutional any attempt upon the part of the legislature to vest in administrative officials a discretion that is essentially arbitrary in character. The application of these principles is discussed in detail in the chapters of the present work dealing with due process of law, the equality of laws, and the conclusiveness of administrative determinations.

A special type of executive discretion is that which gives rise to what are known as Political Questions. These questions, which are often of extreme political importance, but which the courts refuse to control, are specifically discussed in a later chapter.<sup>77</sup>

**§ 20. Legislative Motives.**

With the motives of the legislators the courts do not concern themselves. "The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of government. That it may not do with safety to our institutions."<sup>78</sup>

In *Ex parte McCardle*<sup>79</sup> the court declined to take appellate jurisdiction of the case because of the enactment by Congress of a law which it was well known had been passed for the express purpose of preventing the court from questioning the constitutionality of certain measures which the Federal Government had taken for the "Reconstruction" of the Southern States after the termination of the Civil War. "We are not at liberty," said the court, "to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

In *McCray v. United States*,<sup>80</sup> the cases upon this point were fully

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<sup>77</sup> Chapter LXXIII.

<sup>78</sup> *Interstate Commerce Commission v. Brimson*, (154 U. S. 447).

<sup>79</sup> 7 Wall. 506.

<sup>80</sup> 195 U. S. 27.

reviewed and the doctrine applied to a law which, upon its face, was a tax measure, but, as was alleged, had for its purpose not the raising of revenue but the discouragement of the manufacturing of oleomargarine and the protection of dairy interests. The court said: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

In *Bailey v. Drexel Furniture Co.*<sup>81</sup> the court declared invalid an act of Congress which imposed a tax upon the net income of persons employing child labor. The court found, from an inspection of the other terms of the act, that it was not a revenue measure, but one attempting the regulation of a matter reserved exclusively to the States. Distinguishing the instant case from the *McCray* case, the court pointed out that the law involved in the *McCray* case did not, upon its face, indicate that it was other than a revenue measure, whereas the Child Labor Law did so indicate: in other words, that, as to the Child Labor Law it was not necessary for the court to examine into the motives of those who enacted it, in order to determine that it was not, truly speaking, a tax law.

Other conspicuous cases in which the Supreme Court declined to consider the real purposes sought by Congress in the enactment of laws the unconstitutionality of which was urged, were *Veazie Bank v. Fenno*,<sup>82</sup> in which was upheld an act of Congress imposing a ten per centum tax upon the circulating notes of persons and State banks; and *United States v. Doremus*<sup>83</sup> and *United States v. Jin Fuey Moy*,<sup>84</sup> in which was upheld a Federal act imposing a special tax on the manufacture, importation and sale, or gift of opium or coca leaves or their derivatives, and laying down elaborate rules as to registration of those entitled to sell or prescribe these drugs, and as to reports to be rendered as to sales made or prescriptions given. In the last of these cases the court said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." In *United States v. Doremus*, the court said: "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it." After a consideration of the various administrative features of the act under examination, the court declared: "We cannot agree with the contention that the provisions of Section 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to

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<sup>81</sup> 259 U. S. 20.

<sup>82</sup> 8 Wall. 553.

<sup>83</sup> 249 U. S. 86.

<sup>84</sup> 241 U. S. 394.

declare this act beyond the power of Congress, acting under its constitutional authority, to impose excise taxes." <sup>85</sup>

In *Hill v. Wallace*,<sup>86</sup> decided at the same time as *Bailey v. Drexel Furniture Co.*, the court held invalid the act of Congress of August 24, 1921, known as the Grain Future Trading Act, which imposed a tax upon contracts for the sale of grain for future delivery and provided for the regulation of boards of trade. After reciting the various provisions of the act, the court said: "Our decision just announced, in *Bailey v. Drexel Furniture Co.*, involving the constitutional validity of the Child Labor Tax Law, completely covers this case,"—in other words, the court held that the act upon its very face, that is, by the various regulatory conditions which it imposed, bore evidence to the fact that it was not, in essential character, a revenue measure. No necessity therefore existed for the court to speculate as to the motives of those who enacted it.

In *Smith v. Kansas City Title & Trust Co.*,<sup>87</sup> it was argued, with considerable basis of fact, that the primary purpose of Congress in providing by the Federal Farm Loan Act of July 17, 1916, as amended by the act of January 18, 1918, had been, not the creation of financial agencies of the Federal Government, but to enable the farmers of the country to obtain loans at a low rate of interest. The court replied: "It is urged, the attempt to create these Federal agencies, and to make these banks fiscal agents and public depositories of the government, is but a pretext. But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives."

#### § 21. Policy or Wisdom of Legislation Not Subject to Judicial Determination.

The constitutional power of a law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial criticism or control. Thus, as the court says in *Northern Securities Co. v. United States*:<sup>88</sup> "So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. . . . To depart from [this rule of construction] because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but

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<sup>85</sup> Four justices dissented upon the ground that the act was "a mere attempt by Congress to exert a power not delegated"; that is, the reserved police power of the States.

<sup>86</sup> 257 U. S. 310.

<sup>87</sup> 255 U. S. 180.

<sup>88</sup> 193 U. S. 197.

what interested parties wish it to mean at a particular time and under particular circumstances. . . . If the statute is beyond the constitutional power of Congress, the court would err in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress erred . . . the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law."

This principle is so well established that further citations do not need to be adduced in its support. It is none the less probably true that judges have at times permitted their own estimates as to the desirability or undesirability of laws brought before them to influence their opinion both as to whether or not such laws should be held to be in harmony with constitutional requirements, and as to what construction should be given to the words of the acts. The charge that they have been so influenced, unconsciously if not consciously, has been frequently made by dissenting judges in the opinions which they have filed. A conspicuous instance of this was seen in the dissent which Justice Harlan expressed to the decision of the court in the *Standard Oil* case<sup>89</sup> in which it was held that the prohibitions of the Anti-Trust Act of 1890, though not explicitly so stated, were directed against only such contracts as are in unreasonable restraint of interstate commerce. Justice Harlan said: "It remains for me to refer to another, and, in my judgment,—if we look to the future,—the most important, aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. . . . The court has now read into the act of Congress words which are not to be found there. . . . To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous of all."

Whether or not one considers that the censure thus visited by Justice Harlan upon the majority of the court in this case was merited, one cannot question, as a general proposition, the soundness of the doctrine which he declared.

## § 22. Cautionary Considerations with Regard to the Holding of Statutes Unconstitutional.<sup>90</sup>

The preceding sections have dealt with what may perhaps be termed the intrinsic limitations upon the power of the courts to question the

<sup>89</sup> *Standard Oil Co. v. United States* (221 U. S. 1).

<sup>90</sup> The term Cautionary Considerations is borrowed from the excellent article by Professor E. S. Corwin entitled "Judicial Review in Action" in 74 *Univ. of Penna. Law Review*, 639.

constitutional validity of the acts of the coördinate legislative branch of their government. We have now to deal with certain further restraints which, from prudential or politic reasons, or from a proper respect for the opinions of the legislature, the courts have laid upon themselves when exercising the right to refuse enforcement to statutes deemed by themselves to be unconstitutional.

One of these self-set cautionary limits which the courts have laid upon themselves is that contained in the rule that in cases of reasonable doubt the constitutionality of acts of Congress will be upheld. How vigorously the Supreme Court has applied this rule will be considered in the next chapter which deals with "Principles of Constitutional Construction."

Another limit set to itself by the Supreme Court is that, ordinarily, it will not hold void an act of Congress except by a majority of the full bench. Thus, in 1825, the Court of Appeals of Kentucky refused to follow a decision of the Supreme Court of the United States, which had held a law of Kentucky void as contrary to the Federal Constitution, stating, as a reason, that the decision had not been concurred in by a majority of the entire court. After this occurrence the Supreme Court adopted the rule as stated above. In *New York v. Miln*,<sup>91</sup> decided in 1834, Marshall said: "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four justices [the court then consisted of seven] concur in the opinion, thus making the decision that of a majority of the whole court. In the present cases four justices do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

A further rule repeatedly affirmed by the Supreme Court is that, when it is possible to do so without doing too great violence to the words actually used, the language of a statute will be so restricted as to render the measure constitutional.<sup>92</sup> For it is always presumed that Congress does not intend to exceed its constitutional powers. Where, however, the scope of the law is plainly expressed, and as such is unconstitutional, the court will

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<sup>91</sup> 8 Pet. 120.

<sup>92</sup> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman* (187 U. S. 197). And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. D. & H. Ry. Co.*, (213 U. S. 366).

not resort to a strained or arbitrary interpretation in order to render the law valid. Thus in *Howard v. Illinois Central R. Co.*<sup>93</sup> the court declined to restrict the terms of a law with reference to the liability of a common carrier for injury to "any of its employees" to such employees only as should be injured while engaged in interstate commerce, and thereby to render the statute valid as applied within the States.<sup>94</sup>

In *James v. Bowman*<sup>95</sup> was again illustrated the refusal of the court to limit the express terms of an act of Congress in order to render it constitutional. In this case the court declined, by judicial construction, to limit the application of a statute to Federal elections which in terms provided for the punishment of bribery committed at all elections, Federal

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<sup>93</sup> 207 U. S. 463.

<sup>94</sup> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois C. R. Co. v. McKendree* (203 U. S. 514)." The minority in this case asserted that the court might properly have so restricted the operation of the act in question as to render it constitutional.

In *United States v. Reese* (92 U. S. 214) the court said: "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

And in the *Trade-Mark Cases* (100 U. S. 8) the court said: "If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances, under the act of Congress, and in others under state law."

<sup>95</sup> 190 U. S. 127.



and State. To do so, the court declared, would be judicial legislation. "It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, provided the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute."

In *United States v. Jin Fuey Moy*<sup>96</sup> the court, in order to render constitutional the Harrison Narcotic Act of December 17, 1914, construed the provision making it unlawful for "any person" who has not registered or paid the special tax imposed by the act to have in his possession or control opium or coca leaves, their salts, derivatives, or preparations, so as to make it applicable only to those who were required by the act to register and pay the special tax. "A statute," said the court, "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

### § 23. Separableness of Statutes.

The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law if it is possible to separate the invalid provision from the other provisions without destroying or impairing their efficiency to attain the results evidently intended by the legislature that enacted it. Even when thus separable, however, the court will not hold the remainder of the law valid if there is doubt whether, the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only. Thus in the case of *Howard v. Illinois C. R. Co.*,<sup>97</sup> the court, having held that the act by its terms related to intrastate as well as interstate commerce, declined to hold the act valid even as to employees engaged in interstate commerce. The court said: "As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate."<sup>98</sup>

In *El Paso and Northeastern Ry. Co. v. Gutierrez*<sup>99</sup> the court held valid the Federal Employers' Liability Law as applied to common carriers engaged in trade or commerce in any Territory of the United States or the District of Columbia, although it had previously held the act invalid

<sup>96</sup> 241 U. S. 394. See also, *U. S. v. D. & H. Co.* (213 U. S. 366).

<sup>97</sup> 207 U. S. 463.

<sup>98</sup> Citing *Trade-Mark Cases* (100 U. S. 82).

<sup>99</sup> 215 U. S. 87.

as applied to any of their employees whether engaged in interstate commerce or in commerce wholly within a State.

In *Butts v. Merchants and Miners Transportation Co.*<sup>100</sup> the court refused to separate the operation of the Civil Rights Act of March 1, 1875, as to American vessels upon the high seas, more than a marine league from the land, and the District of Columbia and the Territories, from its operation as to other persons "within the jurisdiction of the United States," and to hold the act valid as to persons within those special places. The court said: "how can the manifest purpose to establish a uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction? How can the use of general terms denoting an intention to enact a law which should be applicable alike in all places within that jurisdiction be said to indicate a purpose to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part?"

The foregoing are but instances of many cases in which the "separableness" of statutes has been considered. In result, it is clear that the courts possess and exercise a wide discretionary power in determining whether or not an invalid provision may be separated from the other provisions of an act, so as to leave valid those other provisions. In this matter the courts speculate freely as to what would probably have been the desires of the enactors of the law had they known that effect would not be given to those provisions of the law which the courts find to be unconstitutional.

#### § 24. Construction by Federal Courts of State Laws and Constitutions.

Except when some Federal power, right, privilege, or immunity is involved, the construction to be given to the laws and constitutions of the States is a matter for final and conclusive determination by the courts of the States whose laws or Constitutions are respectively concerned.<sup>101</sup>

In cases in which the constitutionality of a State law as tested by the constitution of that State is raised, the Federal courts are loth to pass adversely upon the question prior to a determination of it by the courts of that State. Thus, in *Louisville and H. Ry. Co. v. Garrett*,<sup>102</sup> the Supreme Court said: "So far as we are advised the court of appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a State statute to be in conflict with the constitution of the State before that question has been considered by the State tribunals,—to which it properly belongs—unless the case imperatively demands such a decision."<sup>103</sup> Here the argument against the statute is not of that compelling character."

<sup>100</sup> 230 U. S. 126.

<sup>101</sup> See *post*, § 826.

<sup>102</sup> 231 U. S. 298.

<sup>103</sup> Citing *Pelton v. Commercial National Bank* (101 U. S. 143); *Michigan Central Ry. Co. v. Powers* (201 U. S. 245).

**§ 25. Power of Congress to Control the Federal Courts as to Declaring Acts of Congress Void.**

The exercise by American courts of the power to declare void the acts of coördinate legislative bodies has not escaped criticism upon grounds of expediency as well as of constitutional propriety. Thus, leaving aside the question whether or not the courts were justified in their original assumption of the power, not a few critics have alleged that the power has been abused, or, at any rate, that the result of its exercise has been to defeat highly desirable legislative measures. This view became especially outspoken after the decision in 1905 of *Lochner v. New York*,<sup>104</sup> and *Ives v. South Buffalo Railway Co.*,<sup>105</sup> by the Court of Appeals of New York.

That during recent years the use by the courts of this power has been of greater significance than was formerly the case is certainly true. This has been due to several causes. In the first place, it is undoubtedly true that the courts have not applied with the strictness they originally did the principle of reasonable doubt, presently to be discussed,<sup>106</sup> as to the constitutionality of legislative acts. In the second place, the constitutional limitation of "due process of law" has been steadily broadened in its signification so as to bring additional legislation within its inhibitory force. In the third place, the legislatures themselves have sought, to an increasing extent, to regulate private employments and other activities and the use of private property with a view to bettering economic and social and moral conditions, and have thus rendered their enactments more and more subject to the operation of those constitutional provisions which have for their purpose the protection of personal liberty and the rights of private property from arbitrary or oppressive regulation or infringement.

Whatever may have been the causes, the fact is that the power of the courts to hold invalid acts of coördinate legislative bodies came under such considerable criticism, especially during the decade from 1910 to 1920, that serious efforts were made to place its exercise under formal limitations. This movement was directed especially against the State courts, but the Federal courts, including the United States Supreme Court, did not wholly escape from it.

One proposal was that it should be provided by constitutional amendments that a State law, having been judicially declared void by a State court as in conflict with the State Constitution, should, upon petition of a certain number of voters, or at the instance of the legislature itself, be submitted to the people at the next general election, and, if then approved by them, should be regarded as thereafter valid.

Another proposition, brought forward by Ex-President Roosevelt, and later developed and defended by Mr. W. L. Ransome in his volume *Major-*

<sup>104</sup> 198 U. S. 45.

<sup>105</sup> 94 N. E. Rep. 431.

<sup>106</sup> See *post*, § 26.

*ity Rule and the Judiciary*,<sup>107</sup> was that, as to certain kinds of laws, namely, those enacted by the States in pursuance of what is known as their "police power," and which might be judicially declared invalid as denying due process of law or the equal protection of the law or similar constitutional guarantees, the question as to their validity should be finally determined by the electorate at the polls. This proposal has been denominated, though improperly, the "Recall" of judicial decisions.

A third proposition was that, by constitutional amendment of the Federal or State Constitutions, the courts should be deprived of the power to pass upon the constitutionality of legislative acts, or of specific classes of such acts, or that the power to impose this limitation upon the judicial power should be by statute.

A fourth proposition was that it should be provided by statute or by constitutional amendment, that the superior courts should not have the power to hold unconstitutional the acts of coördinate legislatures except by a vote of more than a bare majority of their justices.<sup>108</sup>

A fifth proposition, which has been carried into effect in several instances, was to broaden by constitutional amendment the power of the legislature so as to avoid for the future the application of constitutional limitations as to classes of laws which the courts had held unconstitutional.<sup>109</sup>

Still another proposal was made, namely, that it should be provided by an amendment to the Federal Constitution that a statute reënacted by Congress after having been held unconstitutional by the Supreme Court should be thereafter deemed constitutional. Apparently, it was not the purpose of the proponents of this proposition that the effect of such a reënactment should be to vest in Congress, for the future, legislative authority with reference to all other measures similar to that of the reënacted statute, but, however this may have been, Mr. Charles Warren has pointed out that the proposed amendment, if adopted, could be taken advantage of by Congress to free itself from all constitutional limits upon its legislative authority. "Suppose," he says, "that, after the amendment is adopted, the very first statute passed by Congress should be a statute taking away *all* power in the court to pass upon the constitutionality of Federal statutes; then, after the court holds such a statute unconstitutional, suppose the Congress passes the statute a second time. . . . Thereafter *no* act of Congress could be held either invalid or valid by the

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<sup>107</sup> Published in 1912.

<sup>108</sup> Article IV of the present Constitution of Ohio contains the provision that "no law shall be held unconstitutional and void by the Supreme Court [of the State] without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional." The Ohio Supreme Court is composed of seven judges.

<sup>109</sup> For an example of this, see the amendment of the Constitution of New York to overcome the decision of the *Bakery* case. See *post*, § 1173.

court. Consequently, Congress would be unlimited in power, uncheckable by any court, and bound by no provision of the Constitution, except so far as it chose to regard it. Its own law would supersede the Amendment itself."<sup>110</sup>

It is not the province of this treatise, which is devoted to the discussion of matters of constitutional law rather than of public policy, to consider the necessity for, or expediency of, these proposed reforms.<sup>111</sup> It is, however, appropriate that a word should be said as to the constitutionality of certain of the proposals that have been mentioned.

So far as the changes proposed were to be embodied in or provided for by, constitutional amendments, duly adopted, there would of course arise no question as to their constitutionality. But the same cannot be said as to statutory reforms that were, by some, put forward. As to this, the constitutional, phase of the subject, what will be here said will relate only to the Federal Government, but, for the most part the same may be said, *mutatis mutandis*, with reference to the States.

Congress has the undoubted power to determine, within the general limits of the Federal judicial power, the extent of the Supreme Court's appellate jurisdiction. It can give and it can take away.<sup>112</sup> This being so, it may be argued that Congress may constitutionally determine the conditions under which such jurisdiction as it may see fit to grant may be exercised; and that, among these conditions, may be included the provision that the court shall not, except by a certain majority of its bench,

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<sup>110</sup> *Congress, the Constitution and the Supreme Court*, p. 142.

<sup>111</sup> It is proper to say, however, that the criticism that the courts were unduly hampering the legislatures in their attempts to correct social and industrial evils was directed rather against the State courts than against the Supreme Court of the United States. The only decisions of the Supreme Court which were strongly criticized in this connection were those in which, in 1895, in *Pollock v. Farmers' Loan & Trust Co.* (157 U. S. 429, and 158 U. S. 602) it had invalidated the Federal Income Tax Law, and, in 1905, *Lochner v. New York* (198 U. S. 45), held void a New York law which had forbidden employees in bakeries to work more than ten hours a day. For an excellent statement of the liberal manner in which the Supreme Court of the United States has treated legislation enacted under the so-called "police powers" see the article by Charles Warren entitled "The Progressiveness of the United States Supreme Court" in 13 *Columbia Law Review*, 294. In Mr. Warren's *Congress, the Constitution and the Supreme Court*, published in 1925, is to be found the best argument against the various proposals which have been made to limit the power of the Supreme Court to pass upon the constitutional validity of acts of Congress.

<sup>112</sup> See *Ex parte McCardle* (7 Wall. 506), in which the court dismissed an appeal in a case which had been submitted to it, but over which, before judgment could be given, the court had, by act of Congress, been deprived of jurisdiction.

It scarcely needs to be pointed out that a denial to the Supreme Court of the United States to entertain appeals on writs of error to the State courts leaves the cases to be determined finally by the State courts, and that they will question the constitutionality of laws not only as to their consonance with their own State Constitutions, but as to their agreement with the provisions of the Federal Constitution.

or not at all, hold invalid acts of Congress relied upon in the appeals that are brought to it.<sup>113</sup>

The defect of this argument is the failure to see that there is a clear distinction between a grant of jurisdiction and an attempt to determine the manner in which the jurisdiction which is granted shall be exercised by the courts to which it is given. To do the latter is, in effect, to exercise the judicial power. This, Congress cannot constitutionally do, since it is declared by the Constitution (Art. III, Sec. 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may ordain and establish. It may be assumed, therefore, that, should Congress attempt to regulate the manner in which the Federal courts are to exercise the jurisdiction given to them, either directly by the Constitution, as is the case with the original jurisdiction of the Supreme Court, or by congressional statute, the courts will either refuse to exercise the jurisdiction at all, since they could not exercise it according to their own free judgment as to the legal rights involved, or that they will declare unconstitutional and therefore not binding upon themselves, the limitations attempted to be imposed by Congress upon its exercise.<sup>114</sup>

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<sup>113</sup> In an old-age pension bill introduced into Congress by Representative Berger of Wisconsin was included the provision: "That, in accordance with section 2, article 3 of the Constitution, and the precedent established by the Act of Congress passed over the president's veto, March 27, 1868, the exercise of jurisdiction by any of the federal courts upon the validity of the act is hereby expressly forbidden."

The act of Congress here referred to was that by which the Supreme Court was prevented from rendering judgment in the *McArdle* case.

<sup>114</sup> For a further discussion of the extent of the power of Congress to control the exercise of their jurisdiction by the Federal courts, see *post*, §§ 1065, 1066.

## CHAPTER II

### PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION <sup>1</sup>

#### § 26. Presumption in Favor of the Constitutionality of an Act of Congress.

American courts have reiterated the doctrine that an act of a coördinate legislative body is not to be held unconstitutional if, by any reasonable interpretation of the Constitution or of the statute itself, the two can be harmonized.

In 1796, in *Hylton v. United States*,<sup>2</sup> Justice Chase declared, with reference to a State law: "If the court have such a power [to hold void a legislative act] I am free to declare that I will never exercise it, but in a very clear case," and, two years later, in *Calder v. Bull* <sup>3</sup> Justice Iredell said of this power that it was "of a delicate and awful nature" and, therefore, that the court would never resort to it "but in a clear and urgent case." However, in *Marbury v. Madison* <sup>4</sup> when the power was first actually exercised to invalidate an act of Congress, no such rule of construction was spoken of by Marshall and no mention was made of the deference with which the act and opinion of a coördinate branch of the Government should be treated. But, in the *Dartmouth College* case,<sup>5</sup> decided in 1819, Marshall, with reference to an act of a State legislature, said: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expressed the honest sentiments of each and every member of this bench.

. . . On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the Constitution." Again, in *Ogden v. Saunders*,<sup>6</sup> the court, speaking through Justice Washington, declared:

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<sup>1</sup> The author has not sought, as some writers have done, to distinguish between the provinces of "construction" and "interpretation."

<sup>2</sup> 3 Dall. 171.

<sup>3</sup> 3 Dall. 386.

<sup>4</sup> 1 Cr. 137.

<sup>5</sup> *Dartmouth College v. Woodward* (4 Wh. 625).

<sup>6</sup> 12 Wh. 213.

"It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity until the violation of the Constitution is proved beyond all reasonable doubt."

The power to disallow an act of Congress was not exercised a second time by the Supreme Court until 1856, when, in the *Dred Scott* case<sup>7</sup> certain provisions of the Missouri Compromise Act of 1820 were held unconstitutional and therefore void. In no one of the opinions filed in that case was the doctrine declared that reasonable doubts regarding the constitutionality of acts of Congress should be resolved in favor of their validity. Nor, indeed, do we find the rule in *Gordon v. United States*,<sup>8</sup> or *Ex parte Garland*,<sup>9</sup> or *Reichert v. Felps*.<sup>10</sup> In *Hepburn v. Griswold*,<sup>11</sup> however, we find the court saying: "This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise"; but, in the later cases of *United States v. De Witt*,<sup>12</sup> *Justices v. Murray*,<sup>13</sup> and *Collector v. Day*,<sup>14</sup> this hesitancy in dealing with acts of Congress found no expression. However, in *Knox v. Lee*,<sup>15</sup> it was stated in Justice Strong's opinion that "a decent respect for a coördinate branch of the Federal Government demands that the judiciary shall presume, until the contrary is clearly shown, that there has been no transgression of power by Congress, all its members of which act under oath or obligation to the Constitution."

A little later, in *United States v. Fox*,<sup>16</sup> the court, without expressed reluctance, held void an act of Congress, but, in the *Sinking Fund Cases*,<sup>17</sup> Chief Justice Waite used the following strong language: "The declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt." And a statement to substantially the same effect was made in the opinions of the court rendered in the *Trade Mark Cases*,<sup>18</sup> and in *United States v. Harris*.<sup>19</sup>

From this time on repeated assertions of this doctrine of reasonable doubt were made, even if it was not always expressly stated, or, perhaps, applied, in every case in which the constitutionality of a Federal statute was examined. In the comparatively recent case of *El Paso and North-eastern Ry. Co. v. Gutierrez*<sup>20</sup> we find the court saying: "It is hardly necessary to repeat what this court has often affirmed, that an act of

<sup>7</sup> *Scott v. Sandford* (19 How. 393).

<sup>8</sup> 2 Wall. 561.

<sup>9</sup> 4 Wall. 333.

<sup>10</sup> 6 Wall. 160.

<sup>11</sup> 8 Wall. 603.

<sup>12</sup> 9 Wall. 41.

<sup>13</sup> 9 Wall. 274.

<sup>14</sup> 11 Wall. 113.

<sup>15</sup> 12 Wall. 457.

<sup>16</sup> 95 U. S. 670.

<sup>17</sup> 99 U. S. 700.

<sup>18</sup> 100 U. S. 82.

<sup>19</sup> 106 U. S. 629.

<sup>20</sup> 215 U. S. 87.



Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt as to its unconstitutionality."

It would seem, then, that it may be taken as a principle, avowed by the Supreme Court, that it will grant to an act of Congress every possible presumption in favor of its constitutionality. The propriety of the rule has been set forth in the quotations that have been made from the opinions of the court. It does not need to be said, however, that opportunities have been offered for differences of opinions as to whether, in every case, the courts have, in fact, resolved every possible constitutional doubt in favor of the validity of its legislative enactments. Especially has there been a basis for this doubt when the courts have had to deal with statutes which seem to encroach upon rights secured to the people by express constitutional provisions. In the earlier cases in which the courts were called upon to consider the limitations placed by these constitutional provisions upon the so-called police power of the States, or upon the analogous regulatory powers of the United States, it would almost seem as though the courts held that the statutes were to be deemed presumptively invalid.<sup>21</sup> In their more recent decisions, however, the courts have usually been guided, even as to these laws, by the general rule of interpretation which they have so often avowed.

As will be presently pointed out,<sup>22</sup> this rule has no logical basis when applied to the determination of the validity of State statutes which, it is alleged, trench upon the jurisdiction of the Federal Government.

One contention which has been made by some with reference to this rule requires examination. This is, that when an act of Congress is declared invalid by a divided court it cannot be said that the act has had the benefit of every reasonable doubt. The argument supporting this proposition is that the fact that some of the justices, who are to be presumed to be endowed with reasoning faculties, have expressed the conviction that the act may be held constitutional, is itself evidence that there are possible reasonable grounds for this opinion.<sup>23</sup> In order to meet this proposition it is necessary to examine into the meaning of the phrase "reasonable doubt" as applied to the point at issue.

The late J. B. Thayer in his essay "The Origin and Scope of the American Doctrine of Constitutional Law" <sup>24</sup> makes the doctrine equivalent to that which is supposed to guide juries in their determinations of criminal guilt. Thus he says: "The doctrine is this, that in dealing with the legis-

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<sup>21</sup> Cf. Prof. Cushman's article "Constitutional Opinions by a Bare Majority of the Court" in 19 *Michigan Law Review*, 771, p. 776, note.

<sup>22</sup> Sec. 27.

<sup>23</sup> See, for example, the arguments of Judge S. E. Baldwin in his volume, *The American Judiciary*, p. 103; Goodnow in his *Social Reform and the Constitution*, p. 352; Watson in his *Constitutional Law of the United States*, vol. II, p. 1190, n.

<sup>24</sup> *Legal Essays*.

lative action of a coördinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the Constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, that which the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, the ultimate question is not what is the true meaning of the Constitution, but whether legislation is sustainable or not."

Again, he says: "The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which its judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the Constitution and of the impeached act of the legislature, and to determine as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction, the law is unconstitutional. . . . It can only disregard the act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which courts bring legislative acts: that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the Constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution admits of different interpretations; that there is often a range and choice of judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional."

If, then, the constitutional doctrine be given this meaning, it is clear that what the justices of the Supreme Court have to decide is whether or not it is reasonably possible to give to the Constitution a construction that will validate the laws that are questioned, and it may therefore be held that it is upon this point that the justices divide when there is not a unanimous opinion. This is the theory, but whether it is the one that always governs in fact may be doubted. As to this the author is in agree-

ment with Professor Cushman, when he writes: "The question at once arises whether this somewhat hair-splitting distinction between what a judge thinks and what he thinks a reasonable man might have thought is actually recognized and acted upon by the courts in passing upon the validity of laws. Obviously there can be no authoritative answer to this question since few judges are disposed either to examine or to explain their mental processes with much minuteness. There are instances in which courts have expressed doubts as to the constitutionality of statutes but have still upheld them. There are also cases in which dissenting justices without placing their own opinions positively on record have maintained that laws ought to be upheld since reasonable men might regard them as valid. These cases are most likely to occur when the issue of constitutionality before the court is one depending upon some question of degree, such as the limits to which exercises of the police power may be pushed without infringing upon the guarantees of the Fourteenth Amendment. But in the by and large one cannot read either the majority or dissenting opinions of the courts upon constitutional questions without being convinced that the average judge decides a case in accordance with his own honest view of the constitutionality of the act involved, and is not worrying about what a hypothetical reasonable man might decide. If a court invalidates a law it is in most cases because a majority of the judges believe the law violates the Constitution; and the judges who dissent from that decision do so because they believe it does not." <sup>25</sup>

After an acute discussion in which he shows that the requirement of a unanimous jury in the case of criminal verdicts does not stand on all fours with the requirement of a unanimous court in the case of judgments as to the constitutionality of legislative enactments, Professor Cushman says: "The most workable theory in regard to the matter is this: the doctrine of reasonable doubt means that a statute should not be declared unconstitutional so long as a reasonable doubt as to its invalidity remains *in the minds of those to whom is entrusted the power to decide the question of constitutionality*—and under the present rule this means a majority of the court. In other words, so long as the rule exists that five members of the court decide questions for the court, all the doctrine can be reasonably said to mean is that five of the nine members of the Supreme Court must be sure in their minds that a law is invalid. This being true, the fact that four other judges disagree is entirely irrelevant."

#### § 27. Presumption in Favor of the Constitutionality of a State Statute.

The rule of construction that has been under consideration has especial application to acts of Congress. When the constitutionality of a State

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<sup>25</sup> "Constitutional Decisions by a Bare Majority of the Court," in 19 *Michigan Law Review*, 771.

law is involved, the principle is not always applicable. If the question at issue is as to whether a given power resides in the Federal Government or in the States, the fact that a State legislature in its enactment has asserted that it is vested in the States, is no presumption in favor of the validity of the decision. The Supreme Court in passing finally upon this point is not, then, called upon to review the act of a coördinate department, but has to decide between the conflicting claims of two governments, and, quite properly, feels itself at liberty to decide the point as an original proposition; namely, upon the basis of its own judgment as to what is the most reasonable construction of the constitutional provisions involved.

If, however, the State law, whose constitutionality is questioned, is with reference to a matter admittedly within the province of the States, and the question is simply whether that power has been properly exercised, there is held to be a strong presumption that the act is constitutional. Thus, for example, if it is a question whether the States have the power to regulate interstate commerce, or to tax a national bank, or to naturalize aliens, or to enact bankruptcy laws, the presumption is not in favor of the constitutionality of acts in which the State power is asserted. If, however, it is a question, for example, whether the police powers, admittedly belonging to the States, have been constitutionally exercised, the presumption is that they have been so exercised.

An excellent illustration of this last is seen in the treatment by the Supreme Court of the oleomargarine laws of Pennsylvania in the case of *Powell v. Pennsylvania*,<sup>26</sup> decided in 1887. The plaintiff in error had been indicted for selling oleomargarine, plainly marked as such, in violation of a Pennsylvania law absolutely forbidding the sale and production of that commodity within the State. Powell offered to prove that the oleomargarine was pure and as wholesome as butter, and that, in fact, it differed from butter only in that it had a slightly smaller per cent of a substance termed butterine, which gave a flavor to but had nothing to do with the wholesomeness of the product. He claimed, therefore, that a law forbidding the production and sale of this article was not a proper exercise of the police powers of the State, and operated to deprive him of that liberty and property which the Fourteenth Amendment to the Federal Constitution guaranteed him. The Supreme Court of the United States, without questioning the facts asserted regarding the wholesomeness of oleomargarine, upheld the State law, declaring that it could not "adjudge that the defendant's rights of liberty and property have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation

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<sup>26</sup> 127 U. S. 678.

to those objects." This, the Supreme Court said, it could not affirm. Whether or not the law is needed as a protection to the public, the court declared to be a question of fact belonging primarily to the State legislature to determine. "And," the court continued, "as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

When the Federal Supreme Court is called upon to consider the constitutionality of a State law as determined by its conformity with the Constitution of the State, the State Constitution is construed as having for its general purpose the placing of limitations upon the powers of the legislature; whereas, of course, the Federal Constitution is viewed as a grant of legislative power. In other words, whereas the Federal legislature is construed to have only those powers granted to it expressly or impliedly by the Federal Constitution, the State legislatures are considered to possess all powers not expressly or impliedly withdrawn from them by the Federal or their respective State Constitutions.<sup>27</sup>

In those cases in which the courts of the States are called upon to consider the constitutionality of the acts of their own law-making bodies as tested by the Federal or their own State Constitutions, they of course have to deal with the acts of a department of government coördinate in power with themselves; and, therefore, they hold themselves, or at least should hold themselves, bound in all cases to give to the laws that same benefit of rational doubt which the Federal Supreme Court gives to acts of Congress.

In concluding this subject, it is proper to observe that inasmuch as this legislative or executive interpretation of constitutional powers has such an importance as we have seen attached to it, the responsibility for its proper exercise is proportionately great. Those legislators, therefore, who vote for a measure without being honestly convinced of its constitutionality, and excuse themselves upon the ground that, if their action is not valid, the courts have the opportunity so to declare, are recreant to their duty. Not only, as we have seen, may serious consequences follow from

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<sup>27</sup> "The distinction between the United States Constitution, and our State Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature all legislative power." *People v. Flagg* (46 N. Y. 401).

"That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution." *R. R. Co. v. Otoe* (16 Wall. 667).

these acts before their invalidity is judicially determined, but, what is of still more importance, an unfortunate burden is thrown upon the courts. No popular government can successfully endure in which the decisions of its courts do not receive the general approval of the citizen body. But if legislatures recklessly pass measures ostensibly for the benefit of the masses, but invalid when tested by the fundamental law, the odium of defeating these measures is thrown upon the courts, and a popular objection to and distrust of these courts created. For, of course, the people generally cannot be expected to appreciate the constitutional questions involved. All that they can see and appreciate is that their legislative representatives have enacted a measure in their interests, which the courts have declined to recognize as valid.

**§ 28. The Force of Contemporaneous or Long Continued Legislative Interpretation.**

The presumption of constitutionality which attaches to an act of Congress is increased when the legislative interpretation has been frequently exercised during a considerable number of years, or when it dates from a period practically contemporaneous with the adoption of the Constitution, or when, based upon a confidence in its correctness, many and important public and private rights have become fixed.

In *United States v. State Bank* <sup>28</sup> the court, speaking through Justice Story, said: "It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal consideration, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable explanation."

The foregoing had references to the construction of a statute, but the same reasoning is applicable to the Constitution.

In *Lithographic Company v. Sarony* <sup>29</sup> the court declared: "The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the Convention who framed it, is of itself entitled to very great weight, and when it is remembered that the

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<sup>28</sup> 6 Pet. 29.

<sup>29</sup> 111 U. S. 53.

rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."<sup>30</sup>

In *Schell's Executors v. Fauché*<sup>31</sup> the court said: "In all cases of ambiguity the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

In *Lewis Publishing Co. v. Morgan*<sup>32</sup> in which it was alleged that certain requirements, legislatively declared, for "entering" publications so as to entitle them to the privileges of second-class mail matter, amounted to an unconstitutional curtailment of the freedom of the press, the court, after an examination of the history of the manner in which Congress had exercised its authority to establish and maintain post offices and post roads, and especially with reference to the definition of and the privileges to be granted to second-class mail matter, and the administrative practices in connection therewith, said: "In the light of this statement concerning the evolution of the law as to mail matter and its classification, as it existed at the time the provision here involved was enacted, we come to dispose of the controversy as to the meaning of that provision."<sup>33</sup>

In *Swigart v. Baker*<sup>34</sup> the court, with reference to the interpretation to be given to the Reclamation Act of Congress of June 17, 1902, referred to the practical construction which had been given to the act since its adoption by the Secretary of the Interior, and then went on to say: "If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation."

In *United States v. Midwest Oil Co.*<sup>35</sup> the court held that the long-continued practice of the President, with the acquiescence of Congress, to withdraw, in the public interest, public land that otherwise would have been open to private occupation, operated without express statutory authorization as an implied grant of power by Congress to the President to make such withdrawals. The court said: "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and

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<sup>30</sup> See also *Stuart v. Laird* (1 Cr. 299).

<sup>31</sup> 138 U. S. 562.

<sup>32</sup> 229 U. S. 288.

<sup>33</sup> For a discussion of this case, and of the constitutional questions involved in it, see *post*, § 658.

<sup>34</sup> 229 U. S. 187.

<sup>35</sup> 236 U. S. 459.



quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation.”

**§ 29. Legislative and Executive Practice Not Absolutely Binding.**

The Supreme Court, however, has never held itself absolutely bound by a legislative or executive construction (political questions excepted), however long acquiesced in, or however contemporaneous their first statement with the adoption of the Constitution.<sup>36</sup>

In *Webster v. Luther* (163 U. S. 331, 342), Justice Harlan, speaking for the court, said: “The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger* (157 U. S. 1, 34); *United States v. Healey* (160 U. S. 136, 141). But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.”

In *United States v. Graham* <sup>37</sup> the court said: “It matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident there is no room for construction; and, consequently, no need of anything to give it aid. The cases to this effect are numerous.”

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<sup>36</sup> In *Swift v. United States* (105 U. S. 691), the court said: “The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt.”

“Contemporary construction,” says Story, in his *Commentaries* (§ 407), “is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit to which it is entitled. It can never abrogate the text; it can never fritter away the obvious sense; it can never narrow down its true limitations, it can never enlarge its natural boundaries.”

In *United States v. Alger* (152 U. S. 384) the court said: “As the meaning of the statute as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.”

In *Fairbanks v. United States* (181 U. S. 283) the constructive force to be given to legislative and executive practice is reviewed at length. With reference to the principle that the judiciary cannot be conclusively bound thereby the court says: “From this résumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt.”

<sup>37</sup> 110 U. S. 219.



**§ 30. Extrinsic Evidence.**

Generally speaking, in the construction of the Constitution the well-known distinctions between latent and patent ambiguities, and between the use of extrinsic and intrinsic evidence apply. Where the language of the instrument is itself indefinite or is such that more than one meaning may, by grammatical construction, be drawn from its terms, the courts base their determinations upon the language and provisions found within the four corners of the instrument, and without resort to extrinsic evidence. The governing point is as to what is actually written. If a given power may rationally, logically, and grammatically be construed as granted by a given provision, then it is of no countervailing force to adduce the fact that such was not the intention of those by whom the instrument of government was established. Thus, six years after the adoption of our Constitution, the judicial power of the Federal courts was construed to extend to a case in which a State was defendant in a suit brought by a private individual, and support for such construction was undoubtedly supplied by the written word. That such, however, was not the intention of those by whom the Constitution was framed and ratified is quite certain, as was demonstrated by the promptness and unanimity with which the Eleventh Amendment was adopted, preventing a future similar construction.

**§ 31. Technical Terms.**

When, however, there is no ambiguity of grammatical construction, but the words themselves require definition, recourse is properly had to extrinsic evidence. Here it is necessary to learn from extrinsic sources the meaning usually attached to these words at the time the Constitution was framed and, presumably, by those who framed and adopted the Constitution. Examples of such terms are "letters of marque and reprisal," "*ex post facto*," "bill of attainder," "bankruptcy," "admiralty," "equity," "direct tax," "duties," "imposts," "excises," "piracy," "habeas corpus," "citizen," "alliance," "confederation," "republican form of government," "infamous crime," "commerce," etc. The technical term "treason" is defined in the Constitution itself.

One of the principal questions involved in the Dred Scott case was as to the definition of the term "citizen of the United States," as employed in Article III of the Constitution. The Insular cases in considerable measure turned upon the meaning to be ascribed to the expression "United States." In *Texas v. White* it was necessary to enter into a careful definition of the terms "State" and "government" in order clearly to distinguish them.

As has been repeatedly declared by the courts the best rule for interpreting the technical terms employed in the Constitution is to give to them the meaning which they had at the time that instrument was framed

and adopted. When the terms are technical law terms they are to be given the meaning attached to them in the English law.<sup>38</sup>

In a few instances it is, however, to be observed, that the Supreme Court has refused to give to technical terms the meanings attached to them in 1789 by the common law. This has been so especially with reference to the words "admiralty" and "bankruptcy," both of which terms have been given a broader meaning than that furnished by the English common law. Commenting upon this Pomeroy properly says: "The true rule would seem to be this: Where words having a well known, technical sense by the English law are used in the Constitution, and these words are keys to the clauses which protect the private rights and liberties of the people, and especially of clauses which impose direct restraints upon the government in respect of such rights and liberties, and the technical sense itself is necessary for the complete protection of the individual citizen, this signification must still be retained in any interpretation of these provisions. But on the other hand, where words which had a technical meaning according to the English law, are used in clauses which relate to the general functions of legislation and administration, and to the political organization and powers of the government, such sense must be attributed to them as will best carry out the design of the whole organic law, whether that signification be broader or narrower

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<sup>38</sup> The Supreme Court in *South Carolina v. United States* (199 U. S. 437) states this doctrine as follows: "It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men dealing with the facts of political life as they understood them; putting into form the government they were creating and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons v. Ogden* (9 Wheat. 1, 188) well declared: 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.' One other fact must be borne in mind, and that is, in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith v. Alabama* (124 U. S. 465): 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' And by Mr. Justice Gray in *United States v. Wong Kim Ark* (169 U. S. 649): 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett* (21 Wall. 162); *Ex parte Wilson* (114 U. S. 417); *Boyd v. United States* (116 U. S. 616); *Smith v. Alabama* (124 U. S. 465). The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in *Moore v. United States* (91 U. S. 270).' To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

than the one which had received the sanction of the English Parliament and courts.”<sup>39</sup>

**§ 32. The Interpretative Value of Debates in Constitutional Conventions.**

When it is necessary and proper to resort to extrinsic evidence in interpreting the Constitution, an important source of such evidence is to be found in the history of the events which led up to its adoption. Of special importance are the recorded proceedings of the convention which drafted, of the State conventions which ratified, and of the public utterances of the men who played an influential part in the establishment of, the Constitution. Resort is to be had, however, to these sources only with caution, and only where latent ambiguities are to be resolved. Cooley has stated in a manner not to be improved upon the weight properly to be ascribed to debates in conventions. He says: “When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. These proceedings, therefore, are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter

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<sup>39</sup> *Constitutional Law*, 10th ed. 607. Cf. also *id.* 345.

case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the convention, of the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention.<sup>40</sup>

### § 33. The Federalist.

What has been said regarding the interpretative value of the debates in the conventions that framed and ratified the Constitution, and the value of contemporary interpretation thereof by Congress and the Executive, applies to the collection of essays published under the title of *The Federalist*. This is true peculiarly of these essays not only because of their respective authors—Hamilton, Madison and Jay—but because of the purpose for which they were prepared and published, namely, to persuade the several State conventions to ratify the Constitution. Having this construction of the Constitution before them, there are considerable, though not conclusive, grounds for holding that the meaning thus published and not repudiated, was the construction intended by those who put the Constitution into force.<sup>41</sup>

The case of *Chisholm v. Georgia*<sup>42</sup> is, however, a conspicuous instance in which a view advanced in *The Federalist* (that a State would not be suable in the Federal courts at the instance of a citizen of another State) was repudiated by the Supreme Court.<sup>43</sup>

### § 34. The Interpretative Value of Legislative Debates.

As in the case of the examination of the Constitution itself, the courts in considering the constitutionality of a statute hold themselves bound by the words of the statute, that is, they determine the intent of the

<sup>40</sup> *Const. Lim.*, 7th ed. 101.

<sup>41</sup> In the case of *Cohens v. Virginia* (6 Wh. 264; Marshall said: "The opinion of *The Federalist* has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution, puts it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it."

<sup>42</sup> 2 Dall. 419.

<sup>43</sup> For discussion and citation of the instances in which the Supreme Court in its opinions has referred to *The Federalist*, see the article by Charles W. Pierson, "The Federalist in the Supreme Court," in 33 *Yale Law Journal*, 728.

legislature by the words it has employed. And, therefore, they will not resort to legislative debates except where necessary to clear up a latent ambiguity. It should, however, be said that, for purposes of statutory construction the courts show a greater readiness to resort to legislative proceeding than they do for purposes of constitutional construction.

In *Maxwell v. Dow*<sup>44</sup> the court says: "Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body. . . . What speeches were made by other Senators and by Representatives in the House upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used, and not by the speeches made regarding it. What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.<sup>45</sup> In the cases of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such an amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the Amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."<sup>46</sup>

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<sup>44</sup> 176 U. S. 581.

<sup>45</sup> Citing *United States v. Trans-Missouri Freight Association* (166 U. S. 290); *Dunlap v. United States* (173 U. S. 65).

<sup>46</sup> In *United States v. Trans-Missouri Freight Association* (166 U. S. 290) both the majority and minority opinions detail at some length the congressional history of the so-called Anti-Trust Act of 1890, but both admit that this is not a legitimate source of information. The majority justices after their review of the course of the bill through Congress and the debates attendant thereupon, argue that it is impossible in fact to say what were the views of the majority of the members of each House of Congress in relation to the meaning of the act, and add: "There is, too, a general acquiescence in

In 1833, Mr. Calhoun when voting in the Senate upon the tariff act of that year said that he wished it distinctly understood that he did so upon the condition that a certain construction and application should be given to the measure. Other Senators, however, promptly and properly pointed out that such a qualification would be void of any force, as the act would, after enactment, necessarily be given such a meaning as its words and the Constitution would permit.<sup>47</sup>

Generally, as to the policy of the courts with regard to the use of legislative debate for interpretative purposes, it may be pointed out that there would seem to be peculiar reasons why they should be resorted to for this purpose when the question is as to the "separability" of different provisions of the same statute; for here it is necessary for the courts to ascertain, so far as they can, what would probably have been the desires of the legislative bodies; that is, whether, granting the invalidity of certain portions of the measures enacted by them, that they would have wished the other provisions of the statutes to be given effect, notwithstanding the resulting defeat of their wishes as to such invalidated provisions.

### § 35. Reports of Congressional Committees.

It would appear that, for the interpretation of ambiguous or uncertain statutory provisions, the courts will more readily resort to declarations of legislative intent contained in reports of congressional committees, or in statements of the chairmen of such committees, than in the records of the debates attending the enactment of the statutes. Thus in *Lapina v. Williams*<sup>48</sup> the court, while referring to "the unreliability of such debates as a source from which to discover the meaning of the language employed

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the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. U. P. Railroad Co.* (91 U. S. 72); *Aldridge v. Williams* (3 How. 9); Taney, Chief Justice; *Mitchell v. Great Works Milling and Manufacturing Co.* (2 Story, 648); *Queen v. Hertford College* (3 Q. B. D. 693). The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." The opinion then goes on to show that from "the history of the times" it would appear that the act in question was intended to have the meaning which the court attached to it.

Justice Brown in *Downes v. Bidwell* (182 U. S. 244) says: "The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as declaring the construction to be put upon the Constitution by the Courts." (Citing *United States v. Union P. R. Co.*, 91 U. S. 72.) See also *Aldridge v. Williams* (3 How. 9); *U. S. v. Union Pac. Ry.* (91 U. S. 72).

<sup>47</sup> Benton, *Thirty Years' View*, 1, 329.

<sup>48</sup> 232 U. S. 78.

in an act of Congress,<sup>49</sup> nevertheless resorted to reports of the Senate and House committees, and quoted freely from them in order to show what was the intent of the Immigration Act of February 20, 1907, with regard to the deportation of alien prostitutes.

So, also, in *Church of the Holy Trinity v. United States*,<sup>50</sup> considerable reliance was laid upon the report of a congressional committee in order to determine the interpretation to be given to an act of Congress. The same was true of the case of *Knepper v. Sands*,<sup>51</sup> in which the court said in justification of an examination of the report of a congressional committee: "While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet it is also true that we have examined the reports of the committees of either body with a view to determining the scope of statutes passed on the strength of such reports."

In *Johnson v. Southern Pacific Co.*<sup>52</sup> the court, in search of the legislative intent, considered not only the reports of congressional committees, but the recommendations made by the President of the United States to Congress.

In *Caminetti v. United States*<sup>53</sup> we find the statement: "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation."<sup>54</sup> In a dissenting opinion filed in this case, Justice McKenna said: "Of course, neither the declarations of the report of the committee on interstate commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed, besides, of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act, and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of the committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the

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<sup>49</sup> As to this the court cites *United States v. Trans-Missouri Freight Assn.* (166 U. S. 290).

<sup>50</sup> 143 U. S. 457.

<sup>51</sup> 194 U. S. 476.

<sup>52</sup> 196 U. S. 1.

<sup>53</sup> 242 U. S. 470.

<sup>54</sup> Citing *Blake v. National City Bank* (23 Wall. 307); *Bate Refrigerating Co. v. Sulzberger* (157 U. S. 1); *Chesapeake & Potomac Tel. Co. v. Manning* (186 U. S. 238); *Binns v. United States* (194 U. S. 486).



measure it recommends has the purpose it declares and will accomplish it as declared. This being the purpose, the words of the statute should be so construed even if their literal meaning be otherwise."

The statement contained in the last sentence is, perhaps, too strongly made, for only in extreme cases, that is, when to follow the literal language of an act will produce an obviously unjust or unreasonable result, do the courts hold themselves free to depart from the meaning of a statute as expressed in its words, literally construed. However, as Justice McKenna points out, in the case of the Church of the Holy Trinity v. United States,<sup>55</sup> the court held that, though an act of Congress had declared it unlawful for anyone to assist the entrance into this country of any foreigner under contract or agreement "to perform labor or service of any kind," this prohibition did not apply to a contract made with a foreigner to come to the United States and enter the service of the church as rector or pastor. Justice Brewer declared that "it is familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers." It was the contention of Justice McKenna in the Caminetti case that, applying this rule, the words of the so-called Mann Act, though more general in character, should be restricted in their application to systematized or commercialized sexual vice.

In Duplex Printing Press Co. v. Deering<sup>56</sup> it was declared: "By repeated decisions of this Court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body."<sup>57</sup> But reports of committees of House and Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure.<sup>58</sup> And this has been extended to include explanatory statements in the nature of a supplemental report made by the Committee member in charge of a bill in course of passage."<sup>59</sup> Justice Pitney, who spoke for the court in this case, appended to his opinion liberal extracts from the *Congressional Record* in support of the construction given by the court to the statute involved in the case.

In *Binns v. United States*,<sup>60</sup> the court said: "While it is generally true

<sup>55</sup> 143 U. S. 511.

<sup>56</sup> 254 U. S. 443.

<sup>57</sup> Citing *Aldridge v. Williams* (3 How. 9); *United States v. Union P. R. Co.* (91 U. S. 72); *United States v. Trans-Missouri Freight Asso.* (166 U. S. 291).

<sup>58</sup> Citing *Binns v. United States* (194 U. S. 486).

<sup>59</sup> Citing *Binns v. United States* (194 U. S. 486); *Penna. R. Co. v. International Coal Mining Co.* (230 U. S. 184); *United States v. Coca Cola Co.* (241 U. S. 265); *United States v. St. Paul, M. & M. R. Co.* (247 U. S. 310).

<sup>60</sup> 194 U. S. 486.



that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet it is also true that we have examined the reports of the committees of either body with a view to determining the scope of the statutes passed on the strength of such reports."<sup>61</sup> In *United States v. St. Paul, M. & M. Ry. Co.*,<sup>62</sup> the court said: "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment."<sup>63</sup> But the reports of a committee including the bill as introduced, changes made in the frame of a bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications.<sup>64</sup>

### § 36. History of the Times.

The case of *Prigg v. Pennsylvania*<sup>65</sup> illustrates the value of a resort to the "history of the times" and to the general object sought to be obtained, in interpreting an ambiguous constitutional provision. In this case, which involved the question as to the exclusiveness of the power granted to the Federal Government under the fugitive slave clause of the Constitution,<sup>66</sup> Justice Story said: "Historically it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title or ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. . . . How then are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole object of it. If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial powers adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem upon principles of reasoning absolutely irresistible that the latter ought to obtain. No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction equally accordant with the words and sense thereof will enforce and protect them."

Here it is to be observed that Story properly introduced the qualifying

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<sup>61</sup> Citing *Church of the Holy Trinity v. United States* (143 U. S. 457).

<sup>62</sup> 247 U. S. 310.

<sup>63</sup> Citing *United States v. Trans-Missouri Freight Assn.* (166 U. S. 290).

<sup>64</sup> Citing *Blake v. National City Bank* (23 Wall. 307); *Church of the Holy Trinity v. United States* (143 U. S. 457); *Dunlap v. United States* (173 U. S. 65); *Binns v. United States* (194 U. S. 486); *Johnson v. Southern Pac. Co.* (196 U. S. 1); *Penn. Ry. Co. v. International Coal Mining Co.* (230 U. S. 184); *Five Per Cent Discount Cases* (*United States v. M. H. Pulaski*) (243 U. S. 97).

<sup>65</sup> 16 Pet. 539.

<sup>66</sup> Art. IV, Sec. 2, Cl. 3.

condition that the construction supported by the history of the times in which, and the purpose for which, it was formed, must, as compared with another possible construction, be "equally accordant with the words and sense thereof." It is thus to be emphasized that extrinsic evidence may never be used to support an interpretation which the written word does not upon its face reasonably permit. In other words, extrinsic evidence may properly be used to decide between two possible constructions of the written word, but not to add to or subtract from its express provisions.<sup>67</sup>

In *Standard Oil Co. v. United States*<sup>68</sup> the court, while reaffirming the doctrine that congressional debates might not be used as a means for interpreting a statute, nevertheless declared that that rule was not violated by resorting to such debates "as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted." This "environment" of the period when the law is enacted, the court held, has an evidential value for the determination of the general purpose of the act and, therefore, of the general spirit or manner in which the act is to be interpreted and applied. Thus, in the instant case, with reference to the Anti-Trust Act of 1890, the court held that, in the light of such environment, as, in part at least evidenced by the debates in Congress at the time of its enactment, there was doubt as to whether there was a common law of the United States, which, in the absence of legislation, would govern the matters of contracts or combinations in restraint of interstate or foreign trade, or the monopolizing or attempt to monopolize such trade; and that the main cause which led to the Act of 1890 was the thought that such legal regulation was needed.

In *Church of the Holy Trinity v. United States*<sup>69</sup> the court said: "Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."<sup>70</sup>

A notable instance in which the circumstances leading up to the adoption of a constitutional provision, and the purposes sought to be achieved by that provision as shown by such circumstances, were employed in order to determine the meaning of that provision, is shown in the court's determination of the construction to be given to the Sixteenth Amendment.<sup>71</sup>

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<sup>67</sup> Query, as to whether the resort to "history of the times" was legitimate in the *Slaughter House Cases* for the interpretation of the clause of the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

<sup>68</sup> 221 U. S. 1.

<sup>69</sup> 143 U. S. 457.

<sup>70</sup> See also *United States v. Union Pacific R. Co.* (91 U. S. 72).

<sup>71</sup> See *post*, § 409.

**§ 37. Preamble to the Constitution.**

The value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute. It may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, where the intention of the framers does not clearly and definitely appear. As Story says: "The preamble of a statute is a key to open the mind of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute."<sup>72</sup>

Special significance has at various times been attached to several of the expressions employed in the Preamble to the Constitution. These expressions are:

1. The use of the phrase "We, the People of the United States," as indicating the legislative source of the Constitution.
2. The denomination of the instrument as a "Constitution."
3. The description of the federation entered into as "a more perfect Union."
4. The enumeration of "the common defence" and "general welfare" among the objects which the new government is established to promote.

That the Preamble may not be resorted to as a source of Federal authority is so well established as scarcely to need the citation of authorities. As the court says in *Jacobson v. Massachusetts*,<sup>73</sup> "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted."

**§ 38. "We, the People."**

As regards the phrase, "We, the People," as used in the Preamble, it would seem that little light can be obtained from its use, except to fix the fact, which no one has attempted to deny, that the new government derived its right to be from the consent of the people who were to be controlled by it. But whether by "We, the People" was meant all the people of the ratifying States considered as one body politic, or whether it referred to the people as organized in several commonwealth communities, it is, so far as this language is concerned, impossible to say.

The framers of the Constitution of the Southern Confederacy avoided this ambiguity by declaring in the Preamble: "We, the People of the Confederate States, each State acting in its sovereign and independent

<sup>72</sup> *Commentaries*, § 459.

<sup>73</sup> 197 U. S. 11.

character, in order to form a permanent federal government, establish justice . . . do ordain and establish this Constitution for the Confederate States of America."

Commenting upon this change in phraseology, Pomeroy says: "Thus have the opponents of our nationality by their most solemn and deliberate act conceded the correctness of the construction which has been placed [by the Northern States] upon this utterance of the sovereign people of the United States."<sup>74</sup> This is by no means a correct deduction. It was quite proper that the framers of the Confederate Constitution should, without conceding the correctness of the construction of their opponents, from an abundance of caution, use language which no one could misconstrue.

In *Martin v. Hunter's Lessee*<sup>75</sup> Justice Story says: "The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States, but it pronounces that it is established by the people of the United States in the aggregate. . . . Words cannot be plainer than the words used."

This last statement is certainly extreme. It is indeed made plain that the Constitution is not ratified by the governments of the individual States, but it is not clearly indicated whether the ratifying parties are to be considered singly or as a composite whole. And in contradiction to the fact that a single political whole was meant is the fact that in ratifying the Constitution the people did vote by States.<sup>76</sup>

The only way by which the force of this fact is avoided is by the proposition that the ratifying State conventions acted *ad hoc* as agents of a single united people. But this argument is greatly weakened, if not absolutely destroyed, by the fact that only those States were to be considered members of the New Union whose respective peoples, acting in convention, should ratify the Constitution.

The use of the phrase "We, the People of the United States," as indicating the ordainers and establishers of the Union, is, however, of significance in determining the nature of the Union that was intended to be created when taken in connection with the provision of Article VII that the Constitution was to be ratified, not by the State legislatures, but in conventions, for it indicates that the Union was one which the State legisla-

<sup>74</sup> *Constitutional Law*, § 95.

<sup>75</sup> 1 Wh. 304.

<sup>76</sup> The fact that the States are not, as in the Articles of Confederation, mentioned, individually, by name, is of no significance for the fact is that they could not be so mentioned because it could not be known in advance which of the States would ratify.

tures were not competent to create; that, in other words, it was to be not a mere league or confederacy, such as the existing State governments might enter into, but a fundamental Union resulting in the creation of a new National State which, according to the political philosophy of that date, only the people acting in their original sovereign capacity were able to create.

### § 39. "Constitution."

The fact that the instrument of 1789 is termed a "Constitution" has by some been taken to indicate that a National State, and not a confederacy of States was intended to be created. Thus Webster in his reply to Hayne said: "They [the people of the United States] undertook to form a general government which should stand on a new basis; not a confederacy, not a league, not a compact between States, but a Constitution." And in his reply to Calhoun, he declared: "Sir, I must say to the honorable gentleman that, in our American political grammar, Constitution is a noun substantive; it imparts a distinct and clear idea of itself; and it is not to be turned into a poor, ambiguous, senseless, unmeaning adjective, for the purpose of accommodating any new set of political notions. . . . By the Constitution we mean, not a 'constitutional compact,' but simply and directly the Constitution, the fundamental law; and if there be one word in the language which the people of the United States understand, it is that word." And later he says: "Does it call itself a compact? Certainly not. Does it call itself a league, a confederacy, or subsisting treaty between the States? Certainly not. But it declares itself a Constitution."

By members of the school of Webster weight is also given to the fact that it is declared that the people of the United States "do ordain and establish" and not that they "do contract" or "enter into a treaty."

The writer of this treatise is not disposed to ascribe much value to this argument of Webster based upon the use of the word "Constitution." At most it can only have a corroborating value. In the first place, it is by no means certain that the term had, in 1789, the definite technical meaning which Webster ascribes to it. And, in the second place, and more significantly, the nature of the Union provided for by the Constitution is properly to be determined by the distribution of powers actually provided for by it, and not by the title that may have been given to it.

The description of the new federation in the Preamble as "a more perfect Union" has occasionally been referred to as an argument of the complete sovereignty of the United States. For example, in *Texas v. White*, Chief Justice Chase, after referring to the fact that the Articles of Confederation had provided for a perpetual Union, says: "And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult

to convey the idea of indissoluble unity more clearly than by these words. What can be more indissoluble if a perpetual Union, made more perfect, is not?"

**§ 40. The Constitution Is to Be Construed as a Whole.**

Though the terms of the Constitution may not be varied, or its grants of authority limited by abstract doctrines of private rights and of political justice and expediency, the words of each clause are to be interpreted in the light of the other provisions of the Constitution. The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of all the other parts.<sup>77</sup>

This principle has been of dominant force in the construction of the Constitution.

The principle that the Constitution is to be interpreted in the light of the general purpose for the attainment of which it was adopted, coupled with the fact that many of its terms are general in character, has made possible and legitimate two schools of constructionists—the Loose or Nationalistic school, and the Strict or States' Rights school—each dependent upon a belief held as to the general end which the framers of the Constitution had in mind when that instrument was drafted. The Strict or States' Rights constructionist has not always been one who would deny sovereignty or efficiency to the National Government. Thus, Taney, a leader of the strict constructionists, never for a moment doubted the sovereignty of the General Government, or, as he showed in his decision in *Ableman v. Booth*, the supremacy of its laws and of its agents over the laws and agents of the States. He did believe, however, that the sovereign national laws should be kept within as limited a space as possible. This he showed from the first year of his chief-justiceship.

From the general nature and intent of the Constitution have been deduced, not to mention other doctrines, the denial of the right of secession, the power of the courts to hold void State or Federal laws contrary to the Constitution, the jurisdiction of the Federal courts to entertain appeals from the highest State courts in cases in which a Federal right, privilege, or immunity has been set up and denied, the immunity of Federal governmental agencies from interference on the part of the States by taxation or otherwise, the immunity of State agencies from Federal taxation, the exclusive Federal jurisdiction in matters of naturalization, and the liberal construction of "implied" powers generally.

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<sup>77</sup> "In construing the Constitution of the United States we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts." Story, *Commentaries*, § 405.

§ 41. So-called "Natural" or "Unwritten Constitutional" Laws Have No Constructive Force.

The so-called "natural" or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or to extend the written provisions of the Constitution. The utmost that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty.

In not a few instances, especially during early years, the binding force of natural laws is declared, but a careful examination of these cases shows that, practically without exception, the doctrine was used not as the real *ratio decidendi*, but to support, upon grounds of justice and expediency, a decision founded upon the written constitutional law.

Prior to the separation from England, the colonial courts were naturally inclined to minimize the power of the English Parliament, and, therefore, to uphold Coke's *dictum* in the famous Bonham case that an act of Parliament contrary to natural rights and justice is void. And in the political controversies which preceded the Revolution the doctrine of natural rights was relied upon.<sup>78</sup> It would appear, however, that, though often asserted by the courts, no legislative act was held void solely because it was conceived to exceed the proper limits of all legislative power.<sup>79</sup>

When American independence came, it was to be expected that the Americans would apply the doctrine of natural rights and justice in limitation of the law-making powers of their own legislatures, and thus, as said, we do find the principle not infrequently stated, during the early years of the Constitution.<sup>80</sup> Even Chief Justice Marshall lent it, upon occasion, a qualified sanction. "It may well be doubted," he observes in *Fletcher v. Peck*<sup>81</sup> "whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the [State] legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection."<sup>82</sup>

<sup>78</sup> For instance by Otis in his arguments against writs of assistance.

<sup>79</sup> As to whether the South Carolina case of *Bowman v. Middleton* (1 Bay, 252), was such a case, see Thayer, *Cases on Const. Law*, I, 53, note 2.

<sup>80</sup> Cf. Stimson, *Handbook of American Labor Law*, p. 4, note.

<sup>81</sup> 6 Cr. 87; 3 L. ed. 162.

<sup>82</sup> One of the clearest statements of the doctrine, though given *obiter*, is that of Justice Chase in *Calder v. Bull* (3 Dall. 386). He says: "I cannot subscribe to the omnipotence of a state legislature, or that it should be absolute and without control; although the

## § 42. The "Spirit" or Theory of the Constitution.

Closely allied to the assertion that the Constitution is to be interpreted in the light of "natural law," is the doctrine that the fundamental purpose of the constitutional fathers was the erection of a free republican government, and that, therefore, the Constitution should, whatever its express terms may provide, never be so construed as to violate the abstract prin-

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authority should not be expressly restrained by the court, or fundamental law of the State. The people of the United States erected their Constitution or form of government, to establish justice, to promote the general welfare, and secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power they will decide what are the proper objects of it. The nature and ends of the legislative power will limit the exercise of it. This fundamental principle follows from the very nature of our republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principle of the social compact, cannot be considered a rightful exercise of the legislative authority. The obligation of a law in governments established on express compact, and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; a law that takes property from A and gives it to B: It is against all reason and justice for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers if they had not been expressly restrained, would in my opinion be a political heresy, altogether inadmissible in our free republican governments."

Justice Iredell though agreeing in the decision of the court dissented from Chase's reasoning, saying: "If, then, a government composed of legislative, executive and judicial departments were established by a Constitution which imposed no limits on the legislative power, the consequence would immediately be that whatever the legislative should choose to enact would be lawfully enacted, and the judicial power could never interfere to pronounce it void. It is true that some speculative jurists have held, that a legislative act against natural justice must in itself be void; but I cannot think that under such a government, any court of justice would possess a power to pronounce it so. . . . If any act of Congress, or of the legislature of a State, violates those constitutional provisions [of the United States Constitution], it is unquestionably void; though,



ciples deducible from this fundamental fact. Generally speaking, whereas the so-called natural laws have reference to the private rights of the citizen, the protection of his person and property, these principles claimed to be deducible from the spirit of the Constitution as the framework of a free government have reference to the public and political rights of the individual.

Stated in this abstract, philosophical form, the doctrine that the "spirit" of the Constitution is to prevail over its language has no more legal validity than has the doctrine of natural law.

However, as is the case when dealing with principles of natural law or of natural justice, the courts, including the Supreme Court of the United States, have, at times, referred to the "spirit" or the general purpose of the Federal Constitution for the purpose of strengthening its argument in behalf of a particular construction of the powers granted or withheld by that instrument. A conspicuous instance of this was seen in the opinion of Mr. Justice Miller in *Loan Association v. Topeka*.<sup>83</sup> In that case, in which certain bonds issued by a municipal corporation in aid of a manufacturing enterprise were held invalid, Mr. Justice Miller declared that there are certain "rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism. . . . The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . . To lay, with one hand, the power of government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

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I admit, as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed upon the subject; and all that the court could properly say in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

<sup>83</sup> 20 Wall. 655.

It is to be admitted that the language here employed is unsatisfactory in the extreme, and the fact that it should have been used is explainable only by the circumstance that, at the time this case was decided, the court had not recognized the force that might be given to the "due process of law" provisions of the Fifth and Fourteenth Amendments. In 1875, when this case was decided, the provisions of the Fourteenth Amendment were still regarded as intended primarily, and perhaps exclusively, for the protection of the freed negroes. However, even then, Mr. Justice Clifford, in his dissenting opinion, saw the impropriety of the language of the majority opinion and declared the doctrine which, it may be confidently declared, the court would now hold to be the correct one. He said: "Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people and convert the government into a judicial despotism." And, earlier in the same opinion, he said: "When the Constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power, the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the State, save when those rights are secured by some constitutional provision which comes within judicial cognizance."

In *Fallbrook Irrigation District v. Bradley*,<sup>84</sup> decided in 1896, the court substantially adopted Mr. Justice Clifford's doctrine when it declared: "There is no justification for the Federal courts to run counter to the decisions of the highest State courts upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." Having said this, the court went on to say that in the *Loan Association* case there had been no prior decisions of the highest State court of Kansas upholding the constitutionality of the law in question as there had been in the instant case. It would have been better, however, if the court had pointed out that the essential reason why, in the *Loan Association* case, the State statute had been held unconstitutional was that it was in violation of the express provision of the Fourteenth Amendment to the

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<sup>84</sup> 164 U. S. 112.

Federal Constitution with regard to due process of law, and, indeed in the instant case the court went on to hold invalid the State law concerned, on the ground that it was in violation of this Federal prohibition.

It is, perhaps, worthy of mention that non-suability of the United States by its own citizens as well as (since the Eleventh Amendment) the non-suability of a State of the Union by its own citizens, was placed upon a basis of general public law rather than upon any specific provision of the Federal Constitution. Indeed, the generality of the language of Article III of the Constitution was held to be limited by the principle of public law that a sovereign State could not be sued without its consent. It is true that, prior to the adoption of the Eleventh Amendment, the Supreme Court had held in *Chisholm v. Georgia*,<sup>85</sup> that a State of the Union might, under the terms of the constitutional grant of Federal judicial power, be sued by a citizen of the United States, but in *Hans v. Louisiana*,<sup>86</sup> the Supreme Court declared that that holding had been an erroneous one. The court, appealing to a general doctrine of law rather than to the text of the Constitution, said: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law."<sup>87</sup>

Another instance in which, in the author's opinion, unduly loose language was used with reference to the "Spirit of the Constitution" as a touchstone for determining the validity of legislative acts, occurs in the opinion of Mr. Justice White, concurred in by Mr. Justices Shiras and McKenna, in *Downes v. Bidwell*.<sup>88</sup> It was there said: "Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, though unexpressed, principles which are the basis of all free government which cannot be with impunity transgressed. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

This opinion also quotes with approval the statement of Mr. Justice Bradley in the *Mormon Church* case,<sup>89</sup> that "Doubtless Congress, in legis-

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<sup>85</sup> 2 Dall. 419.

<sup>86</sup> 134 U. S. 1.

<sup>87</sup> See *post*, Chapter LXXVII, "The Suability of the State."

<sup>88</sup> 182 U. S. 244.

<sup>89</sup> *Late Corporation of Jesus Christ v. United States* (136 U. S. 1).

lating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

The foregoing dicta were quoted with approval by Mr. Justice Day in his opinion in *Dorr v. United States*,<sup>90</sup> and the language of Mr. Justice Bradley in the *Mormon Church* case was approved by Mr. Justice Brown in his opinion in *Downes v. Bidwell*.

It is the opinion of the author that the statements which have been quoted would have an unfortunate effect if generally accepted and applied as rules of construction or interpretation for determining the powers granted to, or the limitations imposed upon, Congress or to or upon the States by the Constitution,—an unfortunate effect because it would render indeterminate what those powers or limitations are. The line of distinction between conclusions which may be validly drawn from the general purpose of the Constitution and of the nature of the Union or Government intended to be provided for by that instrument and the conclusions which may not, with constitutional propriety, be drawn from the "spirit" of the Constitution, may not always be easy to draw, but the distinction itself is a clear and logical one. The resort to the general nature and purpose of the Constitution in order to determine doubts not otherwise resolvable is a legitimate practice, sustainable by general principles governing the construction of written instruments; but the resort to the "spirit" of the Constitution, in order either to sustain an exercise of governmental power or to impose a limitation upon it which is not provided for by the instrument itself, is not a valid practice, since it stands in essential opposition to the other rules which the court has declared fundamental for determining the power granted to or limitations imposed upon the Federal Government by the Constitution.<sup>91</sup>

#### § 43. Applicability of Constitutional Provisions to Modern Conditions.

In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to these new conditions.

Thus, the grant to the Federal Government of the control over interstate and foreign commerce is held to be one the extent of which, though not

<sup>90</sup> 195 U. S. 138.

<sup>91</sup> See especially the rule regarding the express and implied powers of Congress.

its importance, is not varied by the fact that the instrumentalities by which it is carried on are widely different from those employed in 1789. On the other hand, if the writing of insurance policies, or the dealing in banking instruments of exchange were not, in 1789, considered interstate commercial transactions, and by reason of their very nature could not properly have been, no augmentation in their amount and no increase in the practical need for their Federal regulation will justify a construction that will attach an interstate commercial character to them, and thus bring them within the power of the Federal Government to control.

The principle, as it has been stated, does not prevent a construction by which the powers and limitations enumerated in the Constitution are made applicable to new conditions of fact which were not and could not have been foreseen by those who adopted the Constitution. In the *Dartmouth case*<sup>92</sup> Marshall says: "It is more than possible that the preservation of the rights of this description was not particularly in the minds of the framers of the Constitution when the clause under consideration, impairment of contracts, was introduced into that instrument. . . . It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operations likewise, unless there is something within its literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expounded the Constitution in making it an exception." Again, in *Re Debs*<sup>93</sup> the court said: "Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation by land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce then unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."<sup>94</sup>

Though the terms of the Constitution may not be altered to meet new

<sup>92</sup> 4 Wh. 518.

<sup>93</sup> 158 U. S. 564.

<sup>94</sup> To the same effect, as the foregoing, is the declaration of the court in *South Carolina v. United States* (199 U. S. 437), in which they say: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and,

conditions, except by the process provided by the Constitution for its own amendment, the relative importance of certain of its provisions has changed as new social, political and commercial problems have presented themselves. Thus, in time of war the powers of the President as Commander-in-Chief of the Army and Navy have found wide application: during the "Reconstruction Period" the provision that the United States should guarantee to the States governments republican in form was resorted to in order to endow the Federal Government with authority to establish and maintain in the States which had sought to separate themselves from the Union governments of a character approved by Congress. For thirty-five years after the Constitution was adopted, the Commerce Clause of the Constitution received but little judicial examination, and, not until the decision in 1824 of the case of *Gibbons v. Ogden*,<sup>95</sup> was the importance of this clause in its possible restraining power upon the States clearly stated, and not for many years after then was this restraint rigidly enforced. Not until 1885 did Congress place upon the Federal statute books a measure in affirmative regulation of commerce among the States. At the present time, however, this grant to the Federal Government of the right to regulate commerce with foreign nations and among the several States is turned to as the chief source of constitutional authority upon the part of the National Government to regulate such commerce, and, by means of such regulation, to deal with many of the

as changes come in social and political life, it embraces within its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Scott v. Sanford* (19 How. 393), 'It is not only the same in words, but the same in meaning, and delegates the same power to the government, and reserves and secures the same rights and privileges to the citizen; and in its present form it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

Justice Story, in *Martin v. Hunter's Lessee* (1 Wh. 304) discussing the principle of construction to be applied to the Constitution, declared: "The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

<sup>95</sup> 9 Wh. 1.

great social and economic problems to which modern industrial life has given rise, and for the solution of which the States have shown themselves either constitutionally or administratively incompetent, or, if competent, indisposed to deal with. In the matter of the restraint of both congressional and State legislative action, the due process of law provisions of the Fifth and Fourteenth Amendments have, during recent years, found frequent application, owing partly to the disposition of the State legislatures and of Congress to subject commerce and industry to legal regulation, and partly, it must be confessed, to a gradual opening of the eyes of the courts to the possibilities of judicial restraint upon legislative and executive action presented by the right vested in the courts to determine, both as matters of substantive law and as matters of procedure, what is to be deemed a denial of due process of law.<sup>96</sup>

#### 44. Stare Decisis.

There have been a considerable number of cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions, but there have been more instances in which the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation.

Taney in the *Passenger* cases<sup>97</sup> said: "I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to be founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

In *Washington University v. Rouse*<sup>98</sup> Justice Miller said: "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a court."

There are indeed good reasons why the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to other laws.

In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be

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<sup>96</sup> Closely connected with due process of law is the equal protection of the laws.

<sup>97</sup> 7 How. 283.

<sup>98</sup> 8 Wall. 43.



changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision.<sup>99</sup>

In *Hertz v. Woodman*<sup>100</sup> we find Mr. Justice Lurton saying: "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which again is called upon to consider a question once decided."

In the dissenting opinion of Mr. Justice Brandeis in *State of Washington v. Dawson*<sup>101</sup> we find the following statement with regard to the propriety, upon the part of the Supreme Court of departing from its earlier doctrines if it has come to consider those doctrines as erroneous: "The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many."<sup>102</sup>

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<sup>99</sup> Cf. Baldwin, *American Judiciary*, pp. 56-57.

<sup>100</sup> 218 U. S. 205.

<sup>101</sup> 264 U. S. 219.

<sup>102</sup> In a footnote Mr. Justice Brandeis gives the following instances in which the court has refused to be bound by the doctrine of *stare decisis*:

*Lee v. Chesapeake & Ohio Ry. Co.* (260 U. S. 653, 659), overruling *Ex parte Wisner* (203 U. S. 449); *Terral v. Burke Construction Co.* (257 U. S. 529, 533), overruling *Doyle v. Continental Insurance Co.* (94 U. S. 535), and *Security Mutual Life Insurance Co. v. Prewitt* (202 U. S. 246); *Boston Store v. American Graphophone Co.* (246 U. S. 8, 25), and *Motion Picture Co. v. Universal Film Co.* (243 U. S. 502, 518), overruling *Henry v. Dick Co.* (224 U. S. 1); *United States v. Nice* (241 U. S. 591, 601), overruling *Matter of Heff* (197 U. S. 488); *Pollock v. Farmers' Loan & Trust Co.* (158 U. S. 601), overruling *Hylton v. United States* (3 Dall. 171); *Roberts v. Lewis* (153 U. S. 367, 379), overruling *Giles v. Little* (104 U. S. 291); *Brenham v. German American Bank* (144 U. S. 173, 187), overruling *Rogers v. Burlington* (3 Wall. 654), and *Mitchell v. Burlington* (4 Wall. 270); *Leisy v. Hardin* (135 U. S. 100, 118), overruling *Peirce v. New Hampshire* (5 How. 504); *Morgan v. United States* (113 U. S. 476, 496), overruling *Texas v. White* (7 Wall. 700); *Legal Tender Cases* (12 Wall. 457, 553), overruling *Hepburn v. Griswold* (8 Wall. 603).

To these cases might also be added that of *Garland v. Washington* (232 U. S. 642), in which the court, basing its judgment upon the dissenting opinion of Mr. Justice Peckham in *Crain v. United States* (162 U. S. 625) said:

"Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we are now constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the *Crain* case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled."



## CHAPTER III

### THE DIVISION OF POWERS BETWEEN THE UNITED STATES AND ITS MEMBER STATES

#### § 45. Federal Powers.

The United States Constitution serves a double purpose. It operates as an instrument to delimit the several spheres of Federal and State authority, and to provide for the organization of the Federal Government. In this chapter we shall be concerned with only the first of these two subjects. That *questio vexata* of the original purpose of the Constitution, whether intended to serve as an agreement between sovereign compacting States, or as the fundamental instrument of government of a single sovereign people, it is fortunately no longer necessary to discuss. For the purpose of a treatise on the constitutional law of the United States as it exists to-day it is sufficient to describe the Constitution as a legal instrument distributing governmental powers between the Federal and State Governments, according to the general principle that the powers granted the Federal Government are specified, expressly or by implication, and that the remainder of the possible governmental powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>1</sup>

It will have been noticed that in speaking of the powers possessed by the General Government, the term "delegated" is used, whereas, in speaking of the powers possessed by the States, the word "reserved" is employed. This exhibits the fundamental principle governing the division of powers between the General Government and the States according to which the former possesses only those powers that are by the Constitution granted to it, whereas the States are entitled to all powers except those expressly or by implication denied to them by the Constitution. Thus the General Government is commonly spoken of as one of enumerated and the State Governments as governments of unenumerated powers.

This distinction would in all probability have been recognized and adopted by the Supreme Court as a logical corollary from the general character of the Constitution, had there been no express direction in that instrument itself to such effect. Out of superabundant caution, however, the Tenth Amendment was adopted.

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<sup>1</sup> Tenth Amendment. As to certain of the powers granted to the Federal Government, as will presently appear, the fact that they may be exercised by that government does not, until they are so exercised, deprive the States of the authority to exercise them.

The phrase "or to the people" covers these powers which, though constitutionally exercisable by the States, for aught the Federal Constitution has to say, are by their own State Constitutions denied to their respective governments. Thus the Federal and the State Constitutions differ in this important respect, that the grants of the former operate to endow the General Government with powers that it would not otherwise possess, whereas the provisions of the latter in the main operate to deprive the governments which they create of powers they otherwise would possess.

Except when expressly limited,—as, for instance, where the power which is given to levy taxes is restricted by the provisions that "all duties, imposts, and excises shall be uniform throughout the United States," that "no tax or duty shall be laid on articles exported from any State," and that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," a power granted to the Federal Government is construed to be absolute in character.

#### § 46. Express and Implied Powers.

Though the Federal Government is one of enumerated powers, its powers are not described in detail, and from the very beginning it has been held to possess, not simply those powers that are specifically or expressly given it, but also those necessary and proper for the effective exercise of such express powers. After enumerating the various powers that Congress is to possess, the Constitution declares:<sup>2</sup> "[The Congress shall have power] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Furthermore it will be noticed that in the Tenth Amendment, above quoted, the powers reserved to the States or to the people are not those not expressly delegated to the United States, but simply those not delegated. This is significant in view of the fact that in the corresponding section in the Articles of Confederation the word "expressly" is carefully inserted.<sup>3</sup>

#### § 47. Federal Powers to Be Liberally Construed.

The Constitution is in terms and general character a grant of powers—a grant from the people of the several States to the National Government, and, strictly speaking, as in all grants of power, the authority that may be exercised thereunder is to be limited to powers specifically granted or impliedly given. But whereas, in general, grants of authority are strictly

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<sup>2</sup> Art. I, Sec. 8, Cl. 18.

<sup>3</sup> Article II. "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States in Congress assembled."

construed as against the grantee and in favor of the reserved rights of the grantor, in the case of the Federal Constitution this principle has not been applied. The justification for this has been deduced from the general nature of the Constitution as an instrument of government, and from the character of the end which was sought to be obtained by its establishment. The Federal Government exists, not for the benefit of those who exercise its powers, but to subserve the national interests,—political, industrial, and social,—of the people who framed and adopted it. While, therefore, it is, in essential character, a grant of powers, and is to be construed as such, its terms are to be interpreted in the light of the fact that the people in adopting it desired the establishment and maintenance of an effective National Government, and therefore one endowed with powers commensurate with that end.<sup>4</sup>

In the case of *Gibbons v. Ogden* <sup>5</sup> Marshall took pains to assert that there is no good reason for holding that either the express or the implied powers of the National Government are to be strictly construed. His language is as follows: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which

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<sup>4</sup> "In construing a grant or surrender of powers by the people to a monarch, for his own benefit or use, it is not only natural, but just, to presume, as in all other cases of grants, that the parties had not in view any large sense of the terms, because the objects were a derogation presumably from their rights and interests. But in construing a constitution of government, framed by the people for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises. The powers given by the people to the General Government are not necessarily carved out of the powers already confided to the State governments. They may be such as they originally reserved to themselves. And, if they are not, the authority of the people in their sovereign capacity, to withdraw power from their State functionaries, and to confide it to the functionaries of the General Government, cannot be doubted or denied. If they withdraw the power from the State functionaries, it must be presumed to be, because they deem it more useful for themselves, more for the common benefit and common protection, than to leave it where it has been hitherto deposited. . . . The State governments have no right to assume that the power is more safe or more useful with them, than with the General Government; that they have a higher capacity and a more honest desire to preserve the rights and liberties of the people than the General Government." Story, *Commentaries*, §§ 413-416.

<sup>5</sup> 9 Wh. 1.

may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not therefore think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

**§ 48. Strict Construction a Corollary of the States' Rights Doctrine.**

Without in any way questioning the validity of the rule of construction stated in the preceding paragraphs, it is to be observed that its propriety is absolutely dependent upon the prior assumption that the Federal Government exists as the agent of the people, and not, as declared by the States' Rights theory, as the agent of the States. Had the theory which conceives the United States to be a confederacy of sovereign States, and its govern-

ment as the agent of these creating component units, been accepted, it would have logically followed that a doctrine of strict construction of Federal powers would have been appropriate, for then these powers would have been in direct derogation of the rights reserved by the States that granted them. Strict construction while thus a logical corollary of the States' Rights theory, is not required by the nationalistic theory.

#### § 49. The James Wilson-Roosevelt Doctrine of Construction.

A doctrine of construction radically different from that which has just been stated, and which has never been accepted by the Supreme Court, is one which has been ascribed to James Wilson of Pennsylvania, and in later years urged by President Roosevelt.

This doctrine is, that when a subject has been neither expressly excluded from the regulating power of the Federal Government, nor necessarily left within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power. According, then, to this doctrine, the Ninth and Tenth Amendments which declare that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," are not to be interpreted as reserving to the States, or to the people, those powers which, though not granted to the Federal Government, are, in fact, such as are of Federal importance and which the States are unable effectively to exercise.

The argument of James Wilson, made in 1785 when the United States was under the Articles of Confederation but applicable, *a fortiori*, to the present Constitution, is in the following language: "Though the United States in Congress assembled derive from the particular States no power, jurisdiction, or right which is not expressly delegated by the Confederation, it does not then follow that the United States in Congress have no other powers, jurisdiction, or rights, than those delegated by the particular States. The United States have general rights, general powers, and general obligations, not derived from any particular States, nor from all the particular States taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, powers and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature."

President Roosevelt expressly adopted the foregoing doctrine as sound. He said: "I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson." Interpreting this theory, Roosevelt said: "He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations. In a remarkable letter in which he advocated setting forth in early and clear fashion the powers of the National Government, he laid down the proposition that it should be made clear that there were neither vacancies nor interferences between the limits of state and national jurisdictions, and that both jurisdictions together composed only one uniform and comprehensive system of government and laws; that is, whenever the States cannot act, because the need to be met is not one merely of a single locality, then the National Government, representing all the people, should have complete power to act. . . . Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left vacancies, left blanks between the limits of actual National jurisdiction over the control of the great business corporations. . . . The legislative or judicial actions and decisions of which I complain, be it remembered, do not really leave to the States power to deal with corporate wealth in business. Actual experience has shown that the States are wholly powerless to deal with this subject; and any action or decision that deprives the nation of the power to deal with it, simply results in leaving the corporations absolutely free to work without any effective supervision whatever; and such a course is fraught with untold danger to the future of our whole system of government, and, indeed, to our whole civilization."<sup>6</sup>

The foregoing doctrine is one quite different from the established doctrine of implied powers as developed by Marshall, a doctrine which will be presently discussed. That doctrine, as it will be seen, holds that from an expressly given Federal power there may be implied those powers which are necessary and proper for effectively exercising it. The doctrine thus does not justify, under any circumstances, the assumption of an independent power by the Federal Government. The Wilson-Roosevelt doctrine on the other hand asserts that a subject not originally within the sphere of Federal control, may, by mere change of circumstances, be brought within the Federal field. Thus, to illustrate concretely, it might be argued according to the doctrine of implied powers that as implied in authority expressly granted to Congress to regulate foreign and

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<sup>6</sup> Speech at the dedication of the Pennsylvania capitol at Harrisburg.

interstate commerce, Congress might compel all corporations or individuals manufacturing commodities for foreign or interstate commerce to obtain a Federal license, such a license to be granted upon such terms as Congress might see fit to dictate. According to the Wilson-Roosevelt doctrine, however, it could be argued that the control of manufacturing is not expressly denied the Federal Government nor expressly placed within the exclusive control of the States, and that, under existing industrial conditions it being of Federal importance that these manufacturing concerns, or certain of them, should be regulated, and the States being incompetent to furnish the necessary regulation, therefore, the Federal Government has the power.

Here, it will be seen, there is no resort whatever to the commerce clause, or to any other express grant of power. The doctrine is thus one which in the absence of express prohibition in the Constitution will support the assumption by the Federal Government of any power whatsoever if there be fair ground for holding that regulation is needed and that the States are not able to furnish it.

In *Kansas v. Colorado*,<sup>7</sup> substantially this Wilson doctrine was urged upon the court, the argument being, as summarized by Justice Brewer, that: "All legislative power must be vested in either the State or the National Government, no legislative powers belong to a State government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States."

In refutation of this argument Justice Brewer said: "But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited

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<sup>7</sup> 206 U. S. 46.

by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The Preamble of the Constitution declares who framed it,—'We, the People of the United States,' not the people of one State, but the people of all the States; and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

**§ 50. "Necessary and Proper."**

In pursuance of the foregoing principles the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words "necessary and proper," it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. Thus in the case of the *United States v. Fisher*,<sup>8</sup> decided in 1804, Marshall declared: "It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution."

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<sup>8</sup> 2 Cr. 358.



**§ 51. McCulloch v. Maryland.**

The classic statement, however, of the scope of the "implied" powers of Congress is that made by Marshall in the opinion which he rendered in *McCulloch v. Maryland*.<sup>9</sup> In that great case, the Chief Justice said: "It may with great reason be contended, that a government, entrusted with such ample powers [as is the United States] on the due execution of which the happiness and prosperity of the Nation so vitally depends, must be entrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to stay and embarrass its execution by withholding the most appropriate means."

The determination of what are appropriate means must, Marshall went on to declare, belong to the government which is to employ them. "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

To the argument that a selected means must be an indispensable as well as a proper one, Marshall replied: "Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another."

Applying this interpretation of the word to its use in the Constitution the opinion declared:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which

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<sup>9</sup> 4 Wh. 316.

the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it."

In conclusion of this point, the Chief Justice said: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Reviewing the effect of this decision, it is seen that the words "and proper" as used in the phrase "necessary and proper" are construed not as declaring that a means selected by Congress shall be proper as well as necessary—that is, indispensable—for carrying into effect a specified power, but as qualifying and extending the force of "necessary" so as to render constitutional the selection of any means that may be appropriate, that is, may in any way assist the General Government in the exercise of its constitutional functions. It scarcely needs be said that the question as to whether or not the particular means selected is the best possible means that might have been adopted, is one for Congress to answer. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in any appreciable degree to advance the constitutional end involved.

One further fact regarding the implied powers of Congress is to be noticed. This is that a power employed as incidental to the exercise of an express power may be used free from the limitation under which it would rest if exercised as an express power. Thus, in *Veazie Bank v. Fenno*<sup>10</sup> and *Head Money Cases*<sup>11</sup> the Supreme Court decided that the power of

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<sup>10</sup> 8 Wall. 533.

<sup>11</sup> 112 U. S. 580.

taxation when used simply as a means for regulating commerce and currency, is not subject to the constitutional limitations under which it would rest if exercised for the purpose of raising a revenue. In the *Head Money Cases* the court declared, relative to a *per capita* tax levied by Congress upon persons, not citizens of the United States, coming to this country: "If this is an expedient regulation of commerce by Congress, and the end to be obtained is one falling within the power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank v. Fenno*, the enormous tax of ten per cent. per annum on the circulation of state banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created. . . . It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

**§ 52. Federal Land Banks and Farm Loan Associations.**

By the act of July 17, 1916,<sup>12</sup> entitled "An Act to Provide Capital for Agricultural Development, to Create Standard Forms of Investment based upon Farm Mortgages, to Equalize Rates of Interest upon Farm Loans, to Furnish a Market for United States Bonds, to Create Government Depositories and Financial Agents for the United States, and for Other Purposes," Congress authorized the establishment of twelve institutions, to be denominated Federal Land Banks, each operating within a specific territory, the stock of which might be privately subscribed for, but if not thus subscribed for up to a minimum of \$750,000, was to be purchased by the United States. Ancillary to these banks local National Farm Loan Associations, composed of prospective borrowers, were provided for, each member of which is to subscribe to stock in such Association to the amount of five percentum of the sum he intends to borrow. By these Associations loans secured by land mortgages may be obtained from the Federal Land Banks for certain agricultural purposes specified in the Act, and with the further condition that at the time each loan is negotiated, the Association must subscribe for stock of the Federal Land Bank to an amount equal to five percentum of the loan.

The Act also makes provision (Section 16) for Federal corporations to be known as Joint Stock Land Banks for the carrying on of the business of lending on farm mortgages security and issuing farm loan bonds. These corporations were to be formed by not less than ten natural persons, and to have the same powers as the Federal Land Banks, but the government of the United States was not to purchase or subscribe for any of their capital stock. Like the Federal Land Banks, the Joint Stock Land Banks

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<sup>12</sup> 39 Stat. at L. 360. Amended by act of January 18, 1918; 40 Stat. at L. 431.

might issue bonds secured by the land mortgages held by them. The Act also provided for a Federal Farm Loan Board, which was to have supervision and, as to some important matters, control of the entire system of Banks and Loan Associations. With the approval of this Board, the Banks were authorized to issue bonds, secured by the mortgages obtained from the Loan Associations.

Section 26 of the Act provides: "Section 26. That every federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this act. First mortgages executed to federal land banks, or to joint stock land banks, and farm loan bonds issued under the provision of this act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation.

"Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

"Nothing herein shall be construed to exempt the real property of federal and joint stock land banks and national farm loan associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Other sections of the Act provide: for the ultimate retirement of the original capital stock of the Banks; that at least five per cent of the capital of the Banks shall be invested in United States Government bonds; that stock owned by the Government of the United States shall receive no dividends; that the Federal Land Banks and Joint Stock Land Banks "when designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and that they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them"; that the Federal Land Banks may accept deposits of securities or of current funds from National Farm Loan Associations holding its shares, but to pay no interest on such deposits, and that they may buy and sell United States bonds; that no Federal Land Bank or Joint Stock Land Bank shall have power "to accept deposits of current funds payable

upon demand except from its own stockholders or to transact any banking business or other business not expressly authorized by the provisions of this Act"; and "that the Secretary of the Treasury is authorized, in his discretion, upon the request of the Federal Farm Loan Board, to make deposits for the temporary use of any Federal Land Bank, out of any money in the Treasury not otherwise appropriated."

A reading of the terms of this elaborate Act together with a knowledge of the circumstances under which it was enacted make plain that the chief motive of Congress in enacting it was to provide a ready means by which the farmers of the country might obtain agricultural credits upon reasonable terms. The two kinds of banks provided for were not empowered, indeed were expressly denied the power, to do an ordinary banking business.

The constitutionality of the Act was defended upon the ground that the banks were to act as financial agencies of the Federal Government, and that, as such, their bonds might be exempted from both State and Federal taxation. As such agencies, it was argued, they would furnish a market for United States bonds, provide depositories for Government moneys, and perform generally, when needed, such other financial services as the Government might ask of them. This view was taken by the Supreme Court in *Smith v. Kansas City Title and Trust Co.*<sup>13</sup> in which, without dissent,<sup>14</sup> the court said: "It is urged, the attempt to create these Federal agencies, and to make these banks fiscal agents and public depositories of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. That Congress has seen fit, in making these banks fiscal agencies and depositories of public moneys, to grant to them banking powers of a limited character, in no wise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so. A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending, and caring for money. But whether banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. . . . We therefore conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositories of public moneys and purchases of government bonds, brings them within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm securities at low rates of interest."

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<sup>13</sup> 255 U. S. 180.

<sup>14</sup> Two justices dissented but only upon points of procedure.

As to the exemption of bonds issued by these banks from Federal or State taxation the court, having declared the banks to be fiscal agents of the Federal Government, found no constitutional difficulty.<sup>15</sup>

**§ 53. Primary and Incidental Powers of Federal Agencies Constitutionally Distinguished.**

From the cases of *McCulloch v. Maryland*, *Osborn v. Bank of United States*, *First National Bank v. Fellows*, and *Smith v. Kansas City Title and Trust Company* there is clearly deducible the constitutional doctrine that, as to institutions created or provided for by the United States, those functions are fundamental or primary in character which are concerned with the performance of services for the Federal Government, and that this is so, even if the activities thus authorized constitute but a small, and in other than governmental or constitutional aspect, a relatively unimportant part of the total activities of these institutions. If, in other words, an institution serves, in any way as a Federal agency, it may be given incidental powers to any extent, and as to matters that would not otherwise be within the grant of Congress, if these powers can be reasonably held to be ancillary to, or their exercise in any way an aid in the performance by the institution of its primary powers as a Federal agent.

**§ 54. Resulting Powers.**

Story in his *Commentaries on the Constitution of the United States*<sup>16</sup> refers to a type of implied powers which he terms "Resulting Powers"—those "arising from the aggregate Powers of the National Government," rather than as implied from some specifically granted power. He says: "It will not be doubted, for instance, that, if the United States should make a conquest of any of the territories of its neighbors, the National Government would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specifically enumerated. . . . Other instances of resulting powers will easily suggest themselves."

As thus stated, this doctrine of resulting powers approaches dangerously near to the one that would derive Federal powers from the predicated "inherent sovereignty" of the United States, the impropriety of which is discussed in a later section. The doctrine of resulting powers becomes a valid one only when it is held to mean that, in some cases, a Federal power

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<sup>15</sup> Citing *McCulloch v. Maryland* (4 Wh. 316); *Osborn v. Bank of United States* (9 Wh. 738); *Owensboro Bank v. Owensboro* (173 U. S. 664); *Farmers and M. Sav. Bank v. Minn.* (232 U. S. 516).

<sup>16</sup> Book III, Chapter XXIV.

may be implied from several or a group of enumerated powers rather than from any single one of them.<sup>17</sup>

**§ 55. Legislative Power Deduced from the Treaty-Making Power.**

It would seem to be established that Congress may enact laws appropriate for carrying into effect treaties entered into by the United States, even though this requires legislation with regard to matters not specified by the Constitution as subject to congressional regulation.<sup>18</sup>

**§ 56. Legislative Power Deduced from a Grant of Judicial Power.**

In one instance, at least, as will be seen in the chapter dealing with the admiralty jurisdiction of the Federal courts, an important Federal legislative power has been deduced from a grant of judicial power. Article III of the Constitution declares that the judicial power of the United States shall extend to "all cases of admiralty and marine jurisdiction." The law to be applied in the exercise of this jurisdiction, it has been held, may be supplied by Congress.<sup>19</sup>

**§ 57. International Sovereignty and Responsibility as a Source of Implied Powers.**

Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced corresponding Federal powers. In *Fong Yue Ting v. United States*<sup>20</sup> that court said: "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

Thus, from this general source has been deduced the implied power of the United States to punish the counterfeiting in this country of the securities of foreign countries, the authority to annex by statute unoccupied territory, to establish in foreign countries judicial tribunals, to lease and administer foreign territory, to exclude or to expel from our shores undesirable aliens, and in general to exercise by treaty or statute all those

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<sup>17</sup> This proper use of the doctrine was stated by Marshall in *Cohens v. Virginia* (6 Wh. 264, *post*, § 891). It was also correctly applied by the court in *United States v. Gettysburg Electric Ry. Co.* (160 U. S. 668), when, with reference to the right of the United States to exercise the power of eminent domain it was said: "The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them may be drawn that the power claimed has been conferred."

<sup>18</sup> See *post*, § 316.

<sup>19</sup> See *post*, § 866.

<sup>20</sup> 149 U. S. 698.

powers properly comprehensible under the term "foreign relations" which other sovereign States possess and exercise. The extent of the Federal Government under its treaty-making powers will receive special treatment in a later chapter. It is sufficient to point out in this place that decisions of the Supreme Court have established the doctrine that in the exercise of its treaty-making powers, and in fulfilling its international responsibilities, the United States may exercise regulative control over matters which are not within the legislative power of Congress and which are in general reserved to the States. In short, it may be stated as an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a State which shall be nationally and internationally a sovereign body, and, therefore, that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact. As will later be shown, this, of course, does not mean that constitutional limitations are without any significance when the Federal Government is dealing, through its treaty-making or other powers, with foreign States, but that their application is to be determined in the light of the general doctrine that, in its foreign relations, the United States appears as a fully sovereign State and with all the rights and powers thereunto appertaining except so far as expressly limited by the Constitution itself or impliedly by the nature of the Government for which that instrument provides.

In *Mackenzie v. Hare* <sup>21</sup> the court sustained the right of Congress to provide that an American woman marrying a foreigner should lose her American citizenship upon the ground that such a marriage might involve international complications, and, hence, might attach to such marriage the same results as would follow from her physical expatriation. "As a government," the court said, "the United States has all the attributes of sovereignty. As it has the character of nationality, it has the powers of nationality and especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."

### § 58. Inherent Sovereign Powers.

Sometimes confused with, but quite distinct from the doctrine which ascribes to the Federal Government plenary authority in matters international, and quite different also from the doctrine of resulting powers, is that theory which argues the possession generally by the United States of "inherent" sovereign powers; that is, powers regarded not as implied in express grants of authority whether singly or collectively considered, but as flowing directly from the simple fact of national sovereignty. The

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<sup>21</sup> 239 U. S. 299.



two former doctrines are fairly deducible from the doctrine of implied powers. The latter doctrine, upon the contrary, would derive Federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.<sup>22</sup>

There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers. Chief Justice Taney in denying the President the right to authorize a suspension of the writ of habeas corpus explicitly repudiated the doctrine. "Nor can any argument be drawn," he said, "from the nature of sovereignty, or the necessities of government for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution and neither of its branches can exercise any of the powers of government beyond those specified and granted."<sup>23</sup>

Unfortunately, however, the Supreme Court has not always been as careful as it might have been in denying the propriety of an argument based upon the inherent sovereign rights of the National Government. Al-

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<sup>22</sup> This theory has played a certain part in our constitutional history for many years and was especially pressed during the period following the Spanish-American War and before the decision of the recent Insular Cases. Thus, Senator Platt of Connecticut declared in the Senate, December 19, 1898, that the United States "possesses every sovereign power not reserved in its Constitution to the States or to the people; that the right to acquire territory was not reserved, and is, therefore, an inherent sovereign right; that it is a right upon which there is no limitation and with regard to which there is no qualification, that in certain instances the right may be inferred from specific clauses in the Constitution but that it exists independent of the clauses; that in the right to acquire territory is found the right to govern it; that as the right to acquire is a sovereign and inherent right, the right to rule is a sovereign right not limited in the Constitution." *Congressional Record*, XXXII, No. II, pp. 321-323.

So, also, Senator Foraker of Ohio declared in the Senate, July 1, 1898, in response to a question as to the constitutional source whence he derived the power of the United States to annex foreign territory, that "the power was to be found inherent in our sovereignty—attached to it necessarily as a part of our sovereignty as a nation," and "was also to be found in the Constitution—expressly conferred upon Congress by that provision of the Constitution which authorizes Congress to provide for the general welfare." When asked if he called this doctrine the "higher law," he replied: "The proposition is that it is inherent in sovereignty to do whatever sovereignty may see fit to do, and among other things to acquire territory."

Of substantially the same character were the arguments of Gardiner (*Our Right to Acquire and Hold Foreign Territory*, Putnam's, 1899), and of Magoon, Law Officer, War Department (*Report on the Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States during the War with Spain*. Doc. 234, 56th Cong., 1st Session).

<sup>23</sup> *Ex parte Merryman* (Campbell's Reports, 246).

though it has never actually justified the exercise of a power by the Federal Government upon this ground, it has, *obiter*, several times used language suggesting its validity.<sup>24</sup>

These *dicta*, some of which are cited in the footnote, if taken by themselves, might seem to indicate the acceptance by the Supreme Court of the doctrine of inherent sovereign powers of the General Government. An examination of the cases in which they were delivered discloses, however, that, in each instance, they were *obiter*, the power that was sustained being actually justified as a resulting or implied power. In the *Insular Cases* the doctrine was strongly urged upon the court but received no countenance; and in *Kansas v. Colorado*,<sup>25</sup> a case decided in 1907, in which the doctrine was set up in a somewhat disguised form, the court was emphatic in its repudiation.<sup>26</sup>

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<sup>24</sup> In the *Legal Tender Cases* (12 Wall. 457) Justice Bradley said: "The United States is not only a Government but it is a National Government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. . . . Such being the character of the General Government it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the Government of the United States has express authority in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted and vindicating its authority and existence."

In *United States v. Jones* (109 U. S. 513) the power of eminent domain was declared to be possessed by the United States as an "incident of sovereignty," and because it "belongs to every independent government."

In *Church of Jesus Christ v. United States* (136 U. S. 1) "the power to make acquisitions of territory by conquest, by treaty, and by cession" was declared to be possessed by the United States, not from any express or otherwise implied power, but because these are "an incident of national sovereignty."

In *Fong Yue Ting v. United States* (149 U. S. 698) "the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions in war or in peace," was declared to belong to the United States as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."

<sup>25</sup> 206 U. S. 46.

<sup>26</sup> After referring to the absence of power in the Federal Government to control private property in the States, Justice Brewer, who rendered the opinion of the court, said: "Appreciating the force of this, counsel for the government relies upon 'the doctrine of sovereign and inherent power;' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislative powers belong to a State government other than those which affect solely the internal affairs of that State; consequently all powers which are National in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers

**§ 59. National Supremacy as a Source of Federal Power.**

As resulting powers, may be included all those powers which the Federal Government finds it convenient or appropriate, not so much for carrying into effect powers specifically granted, as for maintaining in general the supremacy of the National Government and its laws. Thus, to quote the words of the court in *Re Quarles*:<sup>27</sup> "The United States are a Nation,

affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'we, the people of the United States,' not the people of one State, but the people of all the States; and Article 10 reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all the powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of the things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction but is to be considered fairly and liberally so as to give effect to its scope and meaning." Mr. C. J. Tiedeman in his work *The Unwritten Constitution of the United States* raises the point whether a correct interpretation of the Tenth Amendment would not give to the National Government those powers the exercise of which is prohibited to the States, but which are neither prohibited nor delegated to the General Government. His claim is that the General Government should be construed to have those powers, for, he argues, the powers must rest somewhere; they are expressly prohibited to the States, and, therefore, they must be possessed by the Nation. The advantage which he conceives would follow from an acceptance of this principle would be the avoidance in many cases of resorting to an undue straining of the doctrine of implied powers in order to enable the General Government to exercise an authority essential to its welfare but not expressly delegated to it.

<sup>27</sup> 158 U. S. 532.

whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object." <sup>28</sup>

**§ 60. Administrative Necessity as a Source of Federal Power.**

Since the close of the Civil War the sovereignty of the National Government has been undisputed. Starting with this as a fundamental premise, constitutional development of the last forty years has been in the direction of endowing the Federal Government with administrative powers adequate for the accomplishment of the purposes for which it is acknowledged to exist. Just as the doctrine of implied powers has been used to broaden the scope of Federal authority at the expense of the reserved rights of the States, so the principle of administrative efficiency has been employed to permit the field of individual rights to be entered. Thus in a remarkable series of cases the courts have permitted the exercise by Federal administrative officials of degrees of administrative discretion that would have startled constitutional jurists of but a generation ago. It is, however, to be observed that, in this line of cases, the courts have not conceded that administrative necessity or convenience can endow the Federal Government with a power not expressly or impliedly granted to it, but rather that this necessity or convenience can be relied upon to justify certain of the ways in which these granted powers may be exercised.

In these cases the Supreme Court has frankly argued that where, for the efficient performance of the administrative duties laid upon the General Government, it is necessary that an administrative order should take the place of a judicial process, it is permissible, provided that, in other respects, the requirements of due process are met. In *Murray's Lessee v. Hoboken* <sup>29</sup> it was held that an administrative officer could fix finally, without judicial review, the amount due the Government from a public official, and collect it by a distress warrant.

In *Springer v. United States* <sup>30</sup> the power of the Government to collect a tax by a sale of land under a warrant issued by the collector was upheld. In *Smelting Co. v. Kemp* <sup>31</sup> the administrative decision of the United States Land Office was held final as to the facts within its statutory jurisdiction.

The power of the Postmaster-General to exclude from the postal service

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<sup>28</sup> Citing *Logan v. United States* (144 U. S. 293).

<sup>29</sup> 18 How. 272.

<sup>30</sup> 102 U. S. 586.

<sup>31</sup> 104 U. S. 636.

the mail of concerns whose business he deems fraudulent has been sustained, though, by the statute conferring the power, no right of judicial review is given. The Supreme Court said: "If the ordinary daily transactions of the Departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government."<sup>32</sup> In *Bartlett v. Kane*<sup>33</sup> the court refused to examine the correctness of an appraisal by an administrative officer of property for taxation, saying: "The interposition of the courts in the appraisal of importations would involve the collection of the revenues in inextricable confusion and embarrassment." With regard to the exclusion of aliens, it has been held that, in the absence of proof of abuse of discretion or other prejudicial error, an administrative officer may decide finally whether or not a person claiming to be a citizen of the United States is in fact such, and, therefore, entitled to enter this country.<sup>34</sup> This decision Justice Brewer, in his dissenting opinion, characterized as "appalling"; but the doctrine has not been since disturbed.<sup>35</sup>

In a manner similar to that in which the National Government has thus by Congress and the Supreme Court been equipped with the powers necessary for the efficient performance of the administrative duties which modern industrial and commercial conditions have thrown upon it, the Supreme Court has, upon simple ground of necessity, sanctioned the exercise by the Federal Government of powers requisite to meet the problems assumed by it in the imperialistic policy upon which it has entered since the Spanish war.

In *De Lima v. Bidwell*<sup>36</sup> the power of the United States over its dependencies was declared to arise, not out of the territorial clause, but from the necessities of the case and from the inability of the States to act on the subject. In *Hawaii v. Mankichi*<sup>37</sup> upon similar grounds of expediency the right to jury trial was asserted not to have been extended to Hawaii, although by joint resolution Congress had declared that all local laws inconsistent with the Constitution of the United States should have no force. In *Downes v. Bidwell* the majority justices, Brown excepted, argued at length the practical necessity of conceding to the General Government the power of annexing foreign territory without incorporating it into the United States.

Upon the same grounds of expediency and practical necessity the

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<sup>32</sup> *Public Clearing House v. Coyne* (194 U. S. 497).

<sup>33</sup> 16 How. 263.

<sup>34</sup> *United States v. Ju Toy* (198 U. S. 253).

<sup>35</sup> As to the conclusiveness of administrative determinations, see § 1094.

<sup>36</sup> 182 U. S. 1.

<sup>37</sup> 190 U. S. 197.

Supreme Court, in *United States v. Kagama*,<sup>38</sup> has sustained the continued exclusive control of the Federal Government over the Indians, even though their tribal autonomy is no longer respected by Congress.

It is important to note that the acts of the Federal Government referred to in this section as held justified by administrative necessity infringe only on the private rights of individuals. The justification of them by the court has not served to transfer State powers to the Federal Government. Such a transfer could not properly be upheld upon the ground of a conceived national necessity.

#### § 61. General Welfare.

Among the purposes enumerated in its Preamble for the securing of which the Constitution is ordained and established is the promotion of the General Welfare. That the Preamble may, in certain cases, be resorted to for the purpose of determining the meaning of ambiguous provisions in the body of the instrument, but that it may not be viewed as itself a source of Federal power has been already pointed out. However, the phrase General Welfare is also used in the body of the Constitution, namely, in Art. I, Sec. 8, which provides that Congress shall have the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Determined and repeated efforts have been made by those anxious to magnify the powers of the Federal Government, or to support the constitutionality of specific proposed or enacted measures of Congress, to have this provision construed as a comprehensive grant of power to the United States to take any action which, conceivably, may aid in the common defence or promote the general welfare of the people of the United States. The adoption of such a construction by the Supreme Court has been repeatedly urged upon it, although it is evident that, were it accepted, the General Government would at once become one whose powers would be without any effective limit.

In substance, those who have urged that this broad interpretation should be given to the words in question have argued that the construction of the clause in which they occur should be that Congress is given the power to lay and collect taxes, etc., and also as a distinct grant of power, to provide for the general welfare of the United States; in other words, that the effect of these latter words is not to be limited to a statement of the purposes for the attainment or promotion of which Federal taxes may be laid and collected.<sup>39</sup>

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<sup>38</sup> 118 U. S. 375.

<sup>39</sup> Gouverneur Morris when preparing the final report of the Committee on Style, in the Constitutional Convention of 1787, put these words in the form of a distinct and separate grant. Upon objection, however, of Roger Sherman, they were again placed in their present position in the Constitution. For a full discussion of the circumstances

Story in his *Commentaries on the Constitution*,<sup>40</sup> published in 1833, states the correct doctrine upon this point, which is that the words "to provide for the common defence and general welfare of the United States" are by way of limitation of the granted taxing power of Congress rather than a grant of a distinct power. He says (§ 919): "A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them."

The limitation thus placed upon the Federal taxing power will be more fully discussed in a later chapter.

#### § 62. Appropriating Power of Congress as a Source of Federal Authority.

It might seem more systematic to treat of the power of Congress to provide for the spending of the public moneys of the United States in connection with the other powers of Congress. It is necessary, however, to treat of it in this place because it is concerned with the general question as to the distribution of powers between the United States and the States.

The power of Congress to make appropriations is nowhere specifically provided for in the Constitution. It is, therefore, an implied power,—a power that may be exercised whenever necessary and proper for carrying into execution any of the specifically granted powers. In general, therefore, it may be said that if Congress has the constitutional power to provide that a thing shall be done it has the implied power to authorize the expenditure of such public moneys of the United States as are needed for that purpose. It has just been seen that Congress has been granted the express power to lay and collect taxes, duties, imposts and excises in order to obtain the means for providing for the common defence and general welfare of the United States. From this grant there results the implied power to Congress to appropriate for these purposes the money so obtained by the United States. Hence it is that, though Congress has not a general legislative power to provide that the Federal Government may do everything, whether by way of regulation or direct control and operation, which may conceivably secure the common defence and promote the general welfare of the United States, it nevertheless has a general power to appropriate the public moneys of the United States for these purposes. In other words Congress can appropriate money from the Federal treasury in aid of projects which it cannot, by law, regulate or provide for their being carried out by Federal agencies.

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under which these words became embodied in the Constitution, see the long letter of James Madison to Andrew Stevenson, of November 17, 1830, and reprinted in Far-  
rand's *Records of the Federal Convention*, Vol. III, pp. 483ff.

<sup>40</sup> Chapter XIV.



In Hamilton's famous report of 1791 on Manufactures, we find the following statement of the appropriating powers of Congress which has become classic. Speaking of the phrase "common defence and general welfare," he said:

"The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare,' and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money.

"The only qualification of the generality of the phrase in question which seems to be admissible is this: That the object to which an appropriation of money is to be made must be general, and not local; its operation extending in fact or by possibility, throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."

The authority of Congress to appropriate money for internal improvements within a State, although the Federal Government has not itself the authority to construct or operate such improvements, is discussed by President Monroe in connection with the veto in 1822 of the Cumberland Road Bill, and by President Jackson in his veto in 1830 of the Maysville Turnpike Bill.

In a paper entitled "Views of the President of the United States on the Subject of Internal Improvements," submitted in connection with his veto, President Monroe took the position that though Congress has not the constitutional power to provide for the construction or operation under Federal direction of roads, canals or other internal improvements within the States, it has the power to appropriate money in aid of such improvements.

He said: "A power to lay and collect taxes, duties, imposts and excises, subjects to the call of Congress every branch of the public revenue, internal and external, and the addition to pay the debts and provide for the common defense and general welfare gives the right of applying the money



raised—that is, of appropriating it to the purposes specified according to a proper construction of the terms. Hence it follows that it is the first part of the clause only which gives a power which affects in any manner the power remaining to the States, as the power to raise money from the people, whether it be by taxes, duties, imposts, or excises, though concurrent in the States as to taxes and excises, must necessarily do. But the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States or in any sense in which power can be controverted, or become a question between the two Governments. The application of money raised under a lawful power is a right or grant which may be abused. It may be applied partially among the States, or to improper purposes in our foreign and domestic concerns; but still it is a power not felt in the sense of other power, since the only complaint which any State can make of such partiality and abuse is that some other State or States have obtained greater benefit from the application than by a just rule of apportionment they were entitled to. The right of appropriation is therefore from its nature secondary and incidental to the right of raising money, and it was proper to place it in the same grant and same clause with that right. By finding them, then, in that order we see a new proof of the sense in which the grant was made, corresponding with the view herein taken of it.”

Having explained that the grant is one of simply a power to appropriate, Monroe then considered the extent to which this power might be carried. He wrote: “It is contended on the one side that as the National Government is a government of limited powers it has no right to expend money except in the performance of acts authorized by other specific grants according to a strict construction of their powers; that this grant in neither of its branches gives to Congress discretionary power of any kind, but is a mere instrument in its hands to carry into effect the powers contained in the other grants. To this construction I was inclined in the more early stage of our Government; but on further reflection and observation my mind has undergone a change, for reasons which I will frankly unfold. The grant consists, as heretofore observed, of a twofold power—the first to raise, the second to appropriate, the public money—and the terms used in both instances are general and unqualified. Each branch was obviously drawn with a view to the other, and the import of each tends to illustrate that of the other. The grant to raise money gives a power over every subject from which revenue may be drawn, and is made in the same manner with the grants to declare war, to raise and support armies and a navy, to regulate commerce, to establish post-offices and post-roads, and with all the other specific grants to the General Government. In the discharge of the powers contained in any of these grants there is no other check than that which is to be found in the great principles of our system, the responsibility of the representative

to his constituents. If war, for example, is necessary, and Congress declares it for good cause, their constituents will support them in it. A like support will be given them for the faithful discharge of their duties under any and every other power vested in the United States. The power to raise money by taxes, duties, imposts, and excises is alike unqualified, nor do I see any check on the exercise of it other than that which applies to the other powers above recited, the responsibility of the representative to his constituents. Congress knows the extent of the public engagements and the sums necessary to meet them; they know how much may be derived from each branch of revenue without pressing it too far; and, paying due regard to the interests of the people, they likewise know which branch ought to be resorted to in the first instance. From the commencement of the Government two branches of this power, duties and imposts, have been in constant operation, the revenue from which has supported the Government in its various branches and met its other ordinary engagements. In great emergencies the other two, taxes and excises, have likewise been resorted to, and neither was the right nor the policy called in question. If we look to the second branch of this power, that which authorizes the appropriation of the money thus raised, we find that it is not less general and unqualified than the power to raise it. More comprehensive terms than to 'pay the debts and provide for the common defense and general welfare' could not have been used. So intimately connected with and dependent on each other are these two branches of power that had either been limited the limitation would have had the like effect on the other. Had the power to raise money been conditional or restricted to special purposes, the appropriation must have corresponded with it, for none but the money raised could be appropriated nor could it be appropriated to other purposes than those which were permitted. On the other hand, if the right of appropriation had been restricted to certain purposes, it would be useless and improper to raise more than would be adequate to those purposes. It may fairly be inferred these restraints or checks have been carefully and intentionally avoided. The power in each branch is alike broad and unqualified, and each is drawn with peculiar fitness to the other, the latter requiring terms of great extent and force to accommodate the former, which have been adopted, and both placed in the same clause and sentence. Can it be presumed that all these circumstances were so nicely adjusted by mere accident? Is it not more just to conclude that they were the result of due deliberation and design? Had it been intended that Congress should be restricted in the appropriation of the public money to such expenditures as were authorized by a rigid construction of the other specific grants, how easy would it have been to have provided for it by a declaration to that effect. The omission of such declaration is therefore an additional proof that it was not intended that the grant should be so construed."

"If, then," Monroe continued, "the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their powers, respectively, is there no limitation to it? Have Congress a right to raise and appropriate to any and to every purpose according to their will and pleasure? They certainly have not. The Government of the United States is a limited Government, instigated for great national purposes, and for those only. Other interests are committed to the States, whose duty it is to provide for them. Each government should look to the great and essential purposes for which it was instituted and confine itself to those purposes. A State government will rarely if ever apply money to national purposes without making it a charge to the nation. The people of the State would not permit it. Nor will Congress be apt to apply money in aid of the State administrations for purposes strictly local in which the nation at large has no interest, although the State should desire it. The people of the other States would condemn it. They would declare that Congress had no right to tax them for such a purpose, and dismiss at the next election such of their representatives as had voted for the measure, especially if it would be severely felt. I do not think that in offices of this kind there is much danger of the two governments mistaking their interests or their duties. I rather expect that they would soon have a clear and distinct understanding of them and move on in great harmony. Good roads and canals will promote many very important national purposes. They will facilitate the operations of war, the movements of troops, the transportation of cannon, of provisions, and every warlike store, much to our advantage and to the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of commerce and political intelligence among the people. They will by being properly directed to these objects enhance the value of our vacant lands, a treasure of vast resource to the nation. To the appropriation of the public money to improvements having these objects in view and carried to a certain extent I do not see any well-founded constitutional objection. . . . The right of appropriation is nothing more than a right to apply the public money to this or to that purpose. It has no incidental power, nor does it draw after it any consequences of that kind. All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the State authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent. . . . The substance of what has been urged on this subject may be expressed in a few words. My idea is that Congress have an unlimited

power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not state, benefit."

In President Jackson's veto of the Maysville Road Bill practically the same constitutional position as that taken by Monroe was assumed; the appropriation in this case, however, was vetoed upon the ground that the improvement in question was, in the President's opinion, of a purely local character, or, as he said, "if it can be considered national, no further distinction between the appropriate duties of the General and State Governments need be attempted, for there can be no local interest that may not with equal propriety be denominated national."

If the history of congressional appropriations be traced, it will be found that the public moneys of the United States have been devoted to a great variety of purposes, many of which have had no relation to the exercise of the specific powers vested by the Constitution in the National Government: they have been, to mention only a few instances, in aid of road-building, education, agriculture and relief, at home and abroad, of sufferers on account of fires, floods, earthquakes, etc.<sup>41</sup>

The extent of the appropriating power of Congress is also illustrated in the case of *United States v. Realty Co.*,<sup>42</sup> in which was upheld the power of Congress to appropriate money for the payment of certain claims which the Federal Government was not legally but only morally obligated to satisfy. The court said: "We are of opinion that the parties in these actions . . . acquired claims upon the Government of an equitable, moral or honorary nature . . . Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having the power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. . . . The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. . . . Payments to individuals, not of right or of a merely legal claim, but payments in the nature of gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity."<sup>43</sup> . . . In regard to the question whether the facts existing in any given case bring it within the description

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<sup>41</sup> See *Congressional Record*, March 24, 1924, for a list of appropriations for relief of such sufferers.

<sup>42</sup> 163 U. S. 427.

<sup>43</sup> Senator Daniel in a speech on the Blair Educational Bill enumerated some forty instances in which Congress had appropriated money to be paid to private individuals. *Cong. Record*, XXI, 143, p. 2295 (1890).

of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the Government."

It scarcely needs be pointed out that a considerable number of the administrative services now carried on by the National Government and maintained by Federal appropriations, depend for their constitutionality wholly upon the power of Congress to authorize the expenditure of public moneys for the promotion of the general welfare of the United States. Among such services which are to a very slight, if any, extent concerned with matters directly connected with the exercise of powers specifically or by implication vested in the Federal Government, may be mentioned the Public Health Service, the Bureau of Education, the Geological Survey, the Bureau of Mines, the Department of Agriculture, with its many bureaus, the Bureau of Fisheries, the Bureau of Labor Statistics, the Children's Bureau, the Women's Bureau, the Smithsonian Institution, the National Gallery of Art, the Bureau of American Ethnology, the Astrophysical Observatory, and, many of the special services in various of the other administrative departments of the Federal Government.

#### § 63. Limitations upon the Appropriating Power.

The preceding sections have shown that upon the mere appropriation of public moneys by Congress there are few effective constitutional limitations. It undoubtedly is true that an appropriation of public money for a purely private purpose would be unconstitutional, as will later be more particularly shown in connection with the discussion of the taxing powers of Congress,<sup>44</sup> but it is clear that, granting this, it will not often be possible to bring this contention, in any specific case, before the courts in such a form that they will feel themselves bound to pass upon it,—always there will be the questions whether the plaintiff has a sufficient pecuniary interest involved, whether the suit is not one against the United States or the State, and whether the matter at issue is not a political and therefore non-judicial one.

This much, however, it is reasonably safe to say, that the appropriating power of Congress does not go further than to authorize the expenditure of public moneys of the United States and to provide instrumentalities or rules and regulations whereby assurance may be had that the moneys thus appropriated will be actually used for the purposes for the attainment of which their expenditure has been authorized by Congress. Thus methods of disbursement, and forms of audit and control may be fixed, and Federal

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<sup>44</sup> *Post*, Chapter XLI.

boards or other instrumentalities created for making these payments and supervising their application to the purposes declared by Congress. Such powers of Federal control would clearly be incidental to, or implied in, the appropriating power. But this, it may be predicted, will be as far as the courts will permit Congress to go. In other words, they will not admit that, because Congress has the power to lend Federal financial aid to projects which concern the General Welfare of the United States, even though these projects have no relation to the matters enumerated in the Constitution as within Federal control, therefore, Congress may authorize the Federal Government, through its own agencies to carry out these non-enumerated projects. Thus, while Congress may appropriate money in aid of education within the States, and see that it is properly expended, it cannot authorize the Federal Government itself to undertake educational works within the States. And the same principle applies with reference to all other matters the control of which is not expressly vested in the Federal Government or implied in the powers thus expressly granted. To hold otherwise would be, in effect, to accept the doctrine, which the courts have repeatedly repudiated, that the words "common defence and general welfare" as used in Article I, Section 8, Clause 1 of the Constitution are not by way of limitation of the Federal taxing power, but a distinct grant of legislative power. Even Hamilton, as shown by the quotation earlier made from his report on Manufactures, inserted the qualifying words "so far as regards an application of money," to his assertion of a general power of the Federal Government to give aid in matters of learning, agriculture, manufactures, and of commerce.

The foregoing distinction between controlling the expenditure of Federal appropriations, and the execution of the projects in aid of which the appropriations are made is a clear enough one conceptually. It is to be admitted, however, that, in actual practice, the line between the two may not be so easy to draw. The drawing of this line, however, in cases properly brought before them, will have to be undertaken by the courts.

It is provided that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

This restriction, it is apparent, operates rather upon the officials of the Treasury Department than upon Congress. The legislative body is left free to authorize such expenditures as it may see fit, and to direct the payments to be made by the Secretary of the Treasury. This direction having been given by law, no discretionary power is left with the Treasury Department to determine whether the payment is a proper one.<sup>45</sup>

Congress may, as has been earlier pointed out,<sup>46</sup> appropriate sums of money for general purposes; for the construction and maintenance of

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<sup>45</sup> *United States v. Price* (116 U. S. 43).

<sup>46</sup> *Ante*, §§ 62, 63.

works which the United States could not constitutionally itself construct or operate; and recognize and pay claims of merely an equitable or moral nature.<sup>47</sup>

That money once covered into the United States Treasury may not, by a judicial process, be recovered therefrom without the sanction of an act of Congress, is further discussed under the title "Suability of the United States."<sup>48</sup>

#### § 64. Bounties.<sup>49</sup>

The constitutionality of bounties has never been squarely passed upon by the Supreme Court. Their validity was questioned in *Field v. Clark*<sup>50</sup> and *United States v. Realty Co.*,<sup>51</sup> but in neither case did the court find itself obliged to decide the point. The ground upon which the constitutionality of bounties has been contested has been that their payment amounts to an appropriation of public moneys primarily for a private purpose. The courts have often held that an expenditure in the public interest is not invalidated by the fact that incidentally private interests are advanced thereby; but in general they have held that an appropriation primarily and directly for the furtherance of private interests is not validated by the fact that incidentally public interests are in a measure promoted.<sup>52</sup>

#### § 65. Alleged Invasion of State Fields of Action by Means of Federal Appropriations.

The constitutionality of conditional grants of money from the Federal treasury, which have been conditioned upon the doing by the States of certain things which have been especially numerous during recent years, has been contested by some on the ground that their purpose and effect is to bring under Federal control matters constitutionally within the exclusive control of the States. This contention reached the Supreme Court in *Massachusetts v. Mellon* and *Frothingham v. Mellon*<sup>53</sup> but the cases were disposed of upon jurisdictional grounds. However, in thus disposing of the cases the court found it necessary to consider certain of the constitutional questions involved. Both cases involved the validity of the act of November 23, 1921,<sup>54</sup> commonly called the "Maternity

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<sup>47</sup> *United States v. Realty Co.* (163 U. S. 427).

<sup>48</sup> *Post*, Chap. LXXXVIII.

<sup>49</sup> For the definition of bounties see *Downs v. United States* (187 U. S. 496).

<sup>50</sup> 143 U. S. 649.

<sup>51</sup> 163 U. S. 427.

<sup>52</sup> See *Lowell v. Boston* (111 Mass. 454); and *Loan Association v. Topeka* (20 Wall. 655). Cf. *Harvard Law Review*, V, 320, article by C. F. Chamberlayne entitled "The Sugar Bounties."

<sup>53</sup> 262 U. S. 447.

<sup>54</sup> 42 St. L. 224.

Act," which provided for appropriations from the Federal treasury to be apportioned among such of the States of the Union as should accept them and comply with the provisions of the Act with reference to steps to be taken to reduce maternal and infant mortality and to protect the health of mothers and infants. The Act created a bureau to act in coöperation with State agencies, which State agencies were required to make reports concerning their operations and expenditures to the Federal bureau.

As summarized in the opinion of the court, it was asserted by the plaintiffs in these cases that these appropriations were for purposes not National in character and that they constituted a means of inducing the States to yield up a portion of their sovereign rights. In the Massachusetts case it was charged that the plaintiff's rights and powers as a sovereign State and the rights of its citizens had thus been invaded and usurped by the Federal Government, and that there was imposed upon the State the alternative of either yielding to the Federal Government a part of its reserved rights or of losing its share of the moneys appropriated—moneys in part collected from the citizens of the State. In the Frothingham case it was alleged that the effect of the statute was, under the guise of taxation, to take the plaintiff's property without due process of law.

As is elsewhere pointed out <sup>55</sup> the court held that the State presented no justiciable controversy either in its own behalf or as the representative of its citizens. "Probably it would be sufficient," said the court, "to point out that the powers of the State are not invaded, since the statute imposes no obligation, but simply extends an option which the State is free to accept or reject." But, the court continued, it also appeared that the point raised by the State was essentially a political one, and therefore not justiciable. "Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution, and within the field exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign rights; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights, or lose their share of the moneys appropriated. But what burden is imposed upon the States, equally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

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<sup>55</sup> *Ante*, § 13.



"In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the Statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial, and therefore is not a matter which admits of the exercise of the judicial power."

As to the contention of the plaintiff in the Frothingham case that, under the guise of taxation to provide for the appropriations in question, her property would be taken without due process of law, the court said: "The administration of any statute likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of such significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-Federal purposes have been enacted and carried into effect."

The opinion in these two cases has been quoted at considerable length as the result reached in them goes far to sustain, or, at any rate, to remove beyond judicial criticism, the whole body of conditional grants of money from the Federal treasury which have been earlier referred to, as well as possible appropriations in the future of a similar nature.<sup>56</sup>

In *Wilson v. Shaw*<sup>57</sup> a citizen of the United States brought suit to restrain the Secretary of the Treasury from paying out money from the Federal treasury in the purchase of property for the construction of the Panama Canal and from borrowing money on the credit of the United States under the act of Congress of June 22, 1902.<sup>58</sup> In its opinion the court said that, among other objections that might be raised against the bill, were whether the suit was really against the United States which

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<sup>56</sup> As to the constitutionality of these Federal "grants-in-aid," see Prof. E. S. Corwin's article "The Spending Power of Congress Apropos the Maternity Act" in 36 *Harvard Law Review*, 548; and Prof. C. K. Burdick's article "Federal Aid Legislation," in the *Cornell Law Quarterly*, June, 1923.

<sup>57</sup> 204 U. S. 24.

<sup>58</sup> 32 St. at L. 481.

had not consented to be sued, and whether the plaintiff showed a sufficient interest in the subject matter to give him a *locus standi* in the courts. However, said the court, "We do not stop to consider these or kindred objections; yet passing them in silence must not be taken as even an implied ruling against their sufficiency. We prefer to rest our decision on the general scope of the bill." <sup>59</sup>

#### § 66. Florida v. Mellon.

A point similar to that considered in the preceding section was raised in the case of *Florida v. Mellon*,<sup>60</sup> decided in 1927. Here it was charged by the plaintiff State that the States were practically coerced with reference to a matter exclusively within their constitutional competence by the provision of the Federal Revenue Act of February 26, 1926,<sup>61</sup> which provided that taxpayers should be allowed, up to a certain amount, a credit upon their Federal estate taxes of similar taxes paid under State laws. Therefore, it was charged, the provision was an unconstitutional invasion of States' rights in that it furnished an inducement to, that practically amounted to coercion upon, the States to levy estate taxes in order that their citizens might have the advantage offered by the Federal law. The validity of the Federal provision was also attacked upon other grounds. The court, in the opinion which it filed, though it noted the fact that this invasion of States' rights had been charged, made no attempt to refute the charge but contented itself with refuting the other attacks that had been made upon the validity of the provision.<sup>62</sup>

#### § 67. Express Limitations upon the Federal Government.

The express limitations upon the powers of the Federal Government are in part limitations upon the manner of exercise of powers expressly given; as, for example, that direct taxes shall be apportioned among the several States according to their respective populations, that naturalization, bankruptcy, and tariff laws shall be uniform throughout the United States, etc., and in part absolute prohibitions upon the exercise, in any manner, of the powers specified. These absolute provisions are to be found, in the main, in Section 9 of Article I and in the first eight Amendments.

From the very first it has been decided by the Supreme Court that the prohibitions contained in these Amendments apply only to the United States. This was first authoritatively declared by Marshall in the case

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<sup>59</sup> The court then sustained the constitutionality of the act authorizing the construction of the Canal under the right of the United States to acquire territory by treaty, and to construct highways over territory thus acquired.

<sup>60</sup> 273 U. S. 12.

<sup>61</sup> 44 Stat. at L. 69.

<sup>62</sup> For a fuller discussion of this case, see the article by A. W. Machen, Jr., "The Strange Case of *Florida v. Mellon*," in 13 *Cornell Law Quarterly*, 351.

of *Barron v. Baltimore*<sup>63</sup> decided in 1833. In his opinion rendered in that case, Marshall said: "The plaintiff . . . insists that the [Fifth] Amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of the United States. The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed next a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers to be conferred on the Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, and not of distinct governments framed by different persons and for different purposes."

The correctness of this decision has never been questioned either by the Federal or the State courts. However, as we shall notice in a later chapter, the argument has been made, but not accepted as valid by the Supreme Court, that the clause of the Fourteenth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," should be so construed as to render the provisions of the first eight Amendments operative upon the States.

In regard to these first eight Amendments it has sometimes been said that it was only an excess of caution that required their incorporation in the Federal Constitution. Inasmuch as the United States was to have only the powers expressly or impliedly given it, it was asserted that the General Government would have been, in the absence of such express limitations, without the authority to exercise the powers that these Amendments enumerate.<sup>64</sup> A consideration, however, of the construction which

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<sup>63</sup> 7 Pet. 243.

<sup>64</sup> Indeed, in the eyes of some, of Hamilton at least, there were affirmative reasons why these limitations should not be expressly stated. In *The Federalist*, No. 84, after showing that Bills of Rights were "stipulations between Kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince," whereas in constitutions "the people in reality surrendered nothing," Hamilton proceeds: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power

several of the provisions of these Amendments have received, especially during recent years, will, it is believed, make it evident that these express limitations upon the Federal Government have been of great importance.<sup>65</sup>

**§ 68. Implied Limitations upon the Federal Government.<sup>66</sup>**

The implied limitations upon the Federal Government are: first, those implied in the express limitations; and second, those which arise from the general nature of the American Federal State. The Constitution looks to a preservation of the several States in the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it be absolutely necessary to its own efficiency, interfere with the free operation of State governments by way either of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise.

The principles governing the deduction of implied limitations upon the Federal Government are the same as those applicable to the construction of implied powers.

In *Fairbank v. United States*<sup>67</sup> the court said: "We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the eighth section, and no such helping clause in respect

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to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . Men disposed to usurp . . . might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given and that the provision against the liberty of the press afforded a clear implication, that a right to prescribe proper regulations concerning it, was intended to be vested in the National Government."

<sup>65</sup> See Chapters LXIV, LXV.

<sup>66</sup> See the able article of W. F. Dodd, "Implied Powers and Limitations in Constitutional Law," in 29 *Yale Law Journal*, 137.

<sup>67</sup> 181 U. S. 283.

to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

#### § 69. Exclusive and Concurrent Powers.

The legislative powers possessed by the Federal Government may be divided into two classes: the one embracing those powers the exercise of which is exclusively vested in the General Government; the other those which, in default of Federal exercise, may be employed by the States.

Some of the powers granted by the Constitution to the General Government are expressly denied to the States. As to the exclusive character of the Federal jurisdiction over these there cannot be, of course, any question. It has, however, been often a matter difficult of determination whether or not various of the powers given to the United States, but not expressly made exclusive, or denied to the States, are so exclusively subject to Federal control that the exercise of them by the States is under no circumstances to be permitted. Shortly stated, the principle that the Supreme Court has laid down for determining this question in each particular case as it has arisen has been the following: As regards generally the powers granted to the National Government there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Laws thus passed by the States are, however, of course subject to abrogation at any time by the enactment by Congress of laws governing the same subjects.<sup>68</sup>

In view of the fact that, as to these so-called concurrent powers, State law always must yield to Federal law, when one exists, it is perhaps unfortunate that the term "concurrent" should have come into use, since the word indicates an equality of jurisdiction which does not exist. Indeed, as Justice McLean said in the *Passenger* cases,<sup>69</sup> as long ago as 1849, "a concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility."

The first appearance of the word "concurrent" in the Constitution itself is in the second section of the Eighteenth Article of Amendment which declares: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Those who

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<sup>68</sup> By the enactment of a Federal law a State law governing the same subject is not nullified but merely suspended during the existence of the Federal statute. Upon the repeal of the Federal statute, the State law again operates without reenactment by the State.

<sup>69</sup> 7 How. 283.

framed this section were evidently of the belief that the term had received at the hands of the Supreme Court a clear and precise definition, but the discussions that have arisen since 1919, when the Amendment was ratified, have shown that this was not the case. It is not sufficient, therefore, to content ourselves with the simple statement of the doctrine that has been given above.<sup>70</sup>

In the early case of *Sturges v. Crowninshield*<sup>71</sup> Chief Justice Marshall, in reference to the matter of bankruptcy, laid down the distinction between the exclusive and concurrent powers of the Federal Government, in the following language: "When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted by Congress, or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it."

The principle thus stated by Marshall is a simple and rational one, and has never been departed from by the Supreme Court, though that court has at times varied in its judgment whether the nature of a given power is such as to preclude State action in the absence of congressional regulation.

In *Houston v. Moore*<sup>72</sup> Justice Johnson said: "The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of those being of vital importance also to State authority and State legislation, it is not to be admitted that the mere grant of such powers in affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar

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<sup>70</sup> Professor N. T. Dowling, in his article, "Concurrent Power under the Eighteenth Amendment," 6 *Michigan Law Review*, 447, has pointed out ten distinct meanings which it is possible to give to the conception of "concurrent" power.

<sup>71</sup> 4 Wh. 122.

<sup>72</sup> 5 Wh. 1.



powers existing in the States, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish a uniform rule of naturalization (*Chirac v. Chirac*, 2 Wh. 259), and the delegation of admiralty and maritime jurisdiction (*Martin v. Hunter*, 1 Wh. 304). In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Tenth Amendment of the Constitution, but upon the soundest principles of general reasoning."

In *Gibbons v. Ogden*,<sup>73</sup> counsel for the State of New York made an elaborate argument in support of the doctrine that the States should be recognized to have a power, concurrent with that of the National Government, to regulate interstate commerce. This, the court denied. However, in *Cooley v. Board of Wardens*,<sup>74</sup> the court later held that as to matters of pilotage and the like which were local in character and effect, the States might legislate even though interstate commerce might be somewhat affected. The court said: "The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the States."

Still later, in *Cardwell v. American River Bridge Co.*,<sup>75</sup> the court, after quoting a number of cases, said: "These cases illustrate the general doctrine now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until Congress intervenes and supersedes their action."

Applying this principle the Supreme Court has held that the States may legislate regarding such matters as pilotage, wharves, harbors, etc.; but may not, even though Congress has not acted, take any steps that, in effect, will operate directly to hinder or regulate the carrying on of interstate commerce itself. "The power of Congress," the court said in *Brown v.*

<sup>73</sup> 9 Wh. 1.

<sup>74</sup> 12 How. 299.

<sup>75</sup> 113 U. S. 205.

Houston,<sup>76</sup> "is certainly so far exclusive that no State has power to make any law or regulation which will affect the full and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction. All laws and regulations are restricted by natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that the commerce shall be free and untrammelled, and any regulation of the subject by the State is repugnant to such freedom."<sup>77</sup>

Though often spoken of as a matter of concurrent jurisdiction, this authority of the States to legislate with reference to matters primarily of local concern, but which incidentally affect interstate commerce, is not in fact a concurrent jurisdiction as to interstate commerce. Laws passed in pursuance of this jurisdiction derive their authority solely from the powers constitutionally reserved to the States, and the moment they relate directly to interstate commerce they become unconstitutional and void. Thus, State laws and Federal laws regulating interstate commerce may happen to affect the same subjects or persons, but they are as wholly distinct from each other as are State and Federal tax laws which affect the same persons, transactions, or pieces of property.

Within comparatively recent years the Supreme Court has gone considerably further in the expansion of the Federal power to regulate interstate commerce so as to make it encroach seriously upon the field of intrastate commerce the regulation of which had been earlier believed to be reserved exclusively to the States. In effect, the courts have given to the Federal Government authority to regulate intrastate commerce in so far as this is necessary effectively to regulate interstate commerce. There is thus, as to intrastate commerce, and to this extent, a concurrent jurisdiction which, as in other instances when exercised by the Federal Government, supersedes that which may have been exercised by the States. This matter is dealt with more fully in the chapters in which the subject of interstate commerce is considered.

It is often a matter of considerable difficulty to determine in specific cases whether Congress in the regulation of matters which are subject to State control in the absence of congressional regulation, has intended to cover the field so completely as to leave no room for constitutional State

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<sup>76</sup> 114 U. S. 622.

<sup>77</sup> For a full discussion of the concurrent legislative powers of the States with reference to interstate and foreign commerce, see Chapter LIII. For a further discussion of concurrent powers with reference to the Federal control of elections, see Chapter XXXIX. See *post*, section 70 for the discussion of the Eighteenth Amendment.



action in the premises. This uncertainty, however, has involved, in most instances, only matters of statutory construction, and not the expounding of constitutional principles; and, moreover, the cases in which these doubts have been dealt with will be considered in connection with the discussion of the specific laws involved.

What has been said in the foregoing paragraphs has related to the conception of concurrent powers, not as expressly provided for in the Constitution, but as deduced from the general character of the governmental scheme provided for by it.

#### § 70. The Eighteenth Amendment and Concurrent Power.

It has already been mentioned that express provision for concurrent jurisdiction by the States over a matter placed within the regulatory power of Congress occurs for the first and only time in the Constitution in the Eighteenth Amendment. Section 2 of that Amendment provides: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

As is well known the provisions for the Federal enforcement of this Amendment are contained in the so-called Volstead Act of 1919<sup>78</sup> and the amendments thereto. A considerable number of constitutional questions have arisen under this act and have been adjudicated by the Supreme Court, and some of these are discussed elsewhere in the present volume in connection with the special constitutional questions involved in them.<sup>79</sup> Here will be discussed, in the main, only the light thrown by these decisions upon the matter of concurrency of Federal and State authority.

That the provision of the Volstead Act which declared intoxicating beverages containing as much as one-half of one per cent of alcohol by volume, and therefore within its prohibitions, was constitutional, as a reasonable definition, was declared by the Supreme Court in *Jacob Ruppert v. Caffey*.<sup>80</sup>

In a series of cases reported under the style of *Rhode Island v. Palmer*,<sup>81</sup> were presented three possible constructions to be given to the term 'concurrent power' as used in the Amendment: (1) that, to be enforced, the Amendment would require joint action by Congress and the States,

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<sup>78</sup> 41 Stat. at L. 305.

<sup>79</sup> See especially the discussion of "Searches and Seizures."

<sup>80</sup> 251 U. S. 264. The court referred to the fact that a survey of the liquor laws of the States revealed that in sixteen States the test as to the beverages to be deemed intoxicating was either a list of enumerated beverages without regard to whether they contained any alcohol, regardless of quantity; that in eighteen States the presence of as much as one-half of one per cent of alcohol by volume was deemed sufficient; that in six States, one per cent of alcohol was sufficient; in one State the test was the presence of the "alcoholic principle"; and in two States, two per cent of alcohol.

<sup>81</sup> 253 U. S. 350. This and the accompanying cases are sometimes cited as the "National Prohibition Cases."

that is, that both would have to act; (2) that the field of enforcement was to be regarded as divided between the National Government and the States along the line of distinction between interstate and intrastate commerce; and (3) that Congress and the State legislatures were empowered to act independently, but, of course, under the condition that State action should not conflict or interfere with that of the National Government.

The court, in its majority opinion, rejected the first two of these constructions, and, apparently, accepted the third, saying: "The words 'concurrent power,' in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

Chief Justice White, in a concurring opinion, rejected also the third construction, upon the ground that, by declaring that, in cases of conflict, the Federal laws should in all cases prevail, the very idea of concurrency of jurisdiction provided for by the Amendment was negated. He said: "As the power of both Congress and the States in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other." Continuing, the Chief Justice declared that the duty was clearly cast upon Congress of defining the prohibited beverages, and also of enacting such regulations and sanctions as would be necessary to make the definition and sanctions operative. Apparently, though upon this point the statement is not quite clear, the position of the Chief Justice was that the States should be held to have authority to enact such measures as they might deem necessary or desirable for rendering effective the definition and sanctions declared by Congress, but that the States should be conceded to have no authority to alter the definition and the sanctions declared by Congress.

In a dissenting opinion, Justice McKenna objected that the majority justices in the conclusions which they had stated<sup>82</sup> had decided what the

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<sup>82</sup> The majority opinion is a peculiar one, in that only a series of conclusions or propositions is stated, without any reasoning in support of them.

action of the court would be with regard to State liquor laws which might be in conflict with those passed by Congress in enforcement of the Amendment. As to the construction to be given to the term "concurrent power" he said: "The government answers that the words mean separate and independent action, and, in case of conflict, that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents. I contest the assertions and oppose to them the common usage of our language, and the definitions of our lexicons, general and legal. Some of the definitions assign to the words 'concurrent power' action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance."

In result, Justice McKenna declared that Section 2 of the Amendment should be so construed as to require for its enforcement "united action between the States and Congress, or, at any rate, concordant and harmonious action." Apparently, then, according to his view, in cases in which Federal and State regulations conflict, neither should be deemed operative.<sup>83</sup>

In *United States v. Lanza*,<sup>84</sup> the concurrency of the Federal Government and of the States with regard to liquor legislation was recognized in the holding that the same act might constitute two offences,—one against the laws of the United States in enforcement of the Eighteenth Amendment, and one against a State liquor law which had been enacted prior to the adoption of the Amendment. The court said: "The amendment was adopted for the purpose of establishing prohibition as a national policy and reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United

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<sup>83</sup> It is of constitutional interest to note the argument of Justice McKenna that prior decisions of the court holding that, when in conflict with Federal laws, State laws passed in exercise by the States of their so-called concurrent powers would have to yield, had been deduced from the fundamental proposition, accepted by the court from the beginning, that the authority of the United States is superior to that of the individual States. "The powers of Congress were not decided to be supreme because they were concurrent with powers in the States, but because of their source, their source being the Constitution of the United States and the laws made in pursuance of the Constitution, or against the source of the powers of the States."

<sup>84</sup> 260 U. S. 377.

States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions."

The court, however, added: "To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the ratio decidendi of our decision in *Vigliotti v. Pennsylvania*, 258 U. S. 403." <sup>85</sup>

In *James Everhard's Breweries v. Day* <sup>86</sup> was upheld as constitutional the provision of the Supplemental Prohibition Act of November 23, 1921, <sup>87</sup> which prohibited physicians from prescribing malt liquors for medicinal purposes.

#### **§ 71. Interaction of Federal and State Jurisdiction: Use by Federal Government of State Agencies for the Enforcement of Their Law, and Vice Versa.**

It is characteristic of the governmental organization of the United States that the National Government is equipped with a complete governmental organization, executive and judicial as well as legislative, for the

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<sup>85</sup> In *Vigliotti v. Pennsylvania*, the court, with reference to a State liquor law, said: "The Brooks Law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in section 2 of the amendment which declares that 'Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.'"

<sup>86</sup> 265 U. S. 545.

<sup>87</sup> 42 Stat. at L. 222.

execution of its own laws; and, similarly, that each of the States is thus equipped. The extent to which, and the manner in which, it is attempted to prevent these governments, State and Federal, from interfering with each other in the exercise of their respective constitutional powers, will be later discussed.<sup>88</sup> Also, in another chapter will be discussed the obligation upon the part of the State courts to give recognition and enforcement, in proper cases, to Federal laws.<sup>89</sup> In general, however, the Federal and State Governments act independently of each other, as regards their executive or administrative services, and the principle is well established that the Federal Government may not impose upon State officials the imperative obligation and burden of executing Federal laws, nor, *a fortiori*, may the States obligate Federal officials to execute State laws.<sup>90</sup> However, it is equally well established that there is no constitutional objection to the granting by the Federal Government to State officials of authority to execute Federal functions, if they, or rather their respective State governments, are willing that they should do so.<sup>91</sup> In fact, there have been a considerable number of instances in which this has been done, some of them dating from the very beginning of the Government. Thus the original Judiciary Act of 1789 authorized State justices of the peace to issue warrants for the arrest of offenders against national laws, and to admit such offenders to bail.<sup>92</sup> In 1793 State magistrates were, by an Act of Congress, authorized to arrest fugitive slaves.<sup>93</sup> Congress early authorized State justices of the peace to issue warrants for the arrest of deserting seamen.<sup>94</sup>

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<sup>88</sup> See § 73.

<sup>89</sup> § 843.

<sup>90</sup> *Kentucky v. Dennison* (24 How. 66).

<sup>91</sup> Some of the States, by express constitutional provisions, forbid their officials from accepting, while in office, Federal appointments. These prohibitions, however, in general, if not in all cases, are declared to apply only to certain of the higher grades of officers. A violation of these prohibitions operates, *ipso facto*, as a resignation of the State offices. It would seem to be clear that the States cannot prevent anyone, not even their own officers, from accepting a Federal appointment: the most that they can do is to declare that such an acceptance will operate to vacate a State office held by the one accepting the Federal office.

<sup>92</sup> This provision is still in force. See Section 1014 of the Revised Statutes.

<sup>93</sup> This provision was upheld in *Prigg v. Pennsylvania* (16 Pet. 539), the court saying: "As to the authority so conferred upon State magistrates, while a difference of opinion has existed and may still exist on the point in different States, whether State magistrates are bound to act under it, none is entertained by the court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

<sup>94</sup> This provision was upheld in *Robertson v. Baldwin* (165 U. S. 275). In *Dallemagne v. Moisan* (197 U. S. 169), it was declared that a State officer might make an arrest of a seaman charged with insubordination on board a foreign vessel, on requisition of the consul of the foreign State to which the vessel belongs, conformably to a provision of a treaty between the United States and the foreign State.

In the absence of express prohibition by the State, the State is presumed to give its consent to the exercise of Federal functions. This doctrine was declared in *Prigg v. Pennsylvania* and has been followed in subsequent cases. Use of State officials in the exercise of its right of eminent domain has been made by the Federal Government.<sup>95</sup> The United States Government has also made use of State courts for the granting of naturalization to aliens.<sup>96</sup> The most recent instances in which the United States has availed itself, in some measure, of State officials for the execution of its own laws, is seen in the Selective Draft Laws of 1917 and 1919,<sup>97</sup> and the National Prohibition Act of 1919.<sup>98</sup>

In the Selective Draft cases (*Arver v. United States*),<sup>99</sup> the court said: "We are of opinion that the contention that the act is void as a delegation of Federal power to State officials because of some of its administrative features is too wanting in merit to require further notice."

#### § 72. Appointment of Federal Officials as State Officials and Vice Versa.

There is no provision of the Federal Constitution which prevents Federal officials from holding at the same time State offices, or which prevents persons occupying State offices from appointment to Federal offices. In general, however, it has been deemed inadvisable that, except as to minor offices, persons should hold at the same time both Federal and State appointments.

In 1873 President Grant issued an Executive Order which declared that, whereas it had been brought to his notice that many persons holding Federal office had accepted offices under the authority of States and Territories or of their municipalities, and whereas it was believed that the holding of both Federal and State offices by the same persons and at the same time was incompatible with a due and faithful discharge of the duties of either office, and moreover "not in harmony with the genius of the Government," therefore, public notice was given that, except as to justices of the peace, of notaries public, commissioners of deeds, sheriffs and deputy sheriffs of the States appointed as deputy marshals of the United States, deputy postmasters with salaries not exceeding \$600 per annum, the acceptance by Federal officers of State or Territorial offices would be deemed to vacate the Federal offices held by them, and to operate as a resignation from such offices by such Federal officials.<sup>100</sup>

By Executive Order of May 8, 1927, President Coolidge declared the Executive Order of President Grant amended by the addition of a para-

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<sup>95</sup> This was upheld in *United States v. Jones* (109 U. S. 513).

<sup>96</sup> Sustained in *Holmgren v. United States* (217 U. S. 509).

<sup>97</sup> 40 Stat. at L. 76, 1211.

<sup>98</sup> 41 Stat. at L. 305.

<sup>99</sup> 245 U. S. 366.

<sup>100</sup> See also Executive Orders of June 26, 1907, and April 14, 1917.

graph providing that "in order that they may more efficiently function in the enforcement of the National Prohibition Act, any State, county, or municipal officer may be appointed, at a nominal rate of compensation, as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition Act and acts supplemental thereto, in States and Territories except in those States having constitutional and statutory provisions against State officers holding office under the Federal Government."<sup>101</sup>

This Executive Order by President Coolidge gave rise, at the time, to considerable discussion as to its constitutionality, but there would seem to be no reasonable ground for contesting its validity.<sup>102</sup>

### § 73. Comity between the United States and the States in the Exercise of Their Respective Powers.

It is clear that the existence of a Federal Government with its own functions and jurisdictional powers, on the one hand, and of forty-eight State Governments with their distinctive functions and jurisdictional powers, necessarily creates many administrative inconveniences (not to speak of opportunities for conflicts) which it is impossible to obviate. However, it is possible to reduce these inconveniences to a minimum by means of friendly coöperative action between the Federal and State authorities when this is constitutionally possible<sup>103</sup> and, in general, this has been the spirit in which the American Federal system has been operated. Thus, the State courts have been permitted to retain jurisdiction over various classes of causes which it would have been possible for Congress to vest exclusively in the Federal courts; and, in those cases in which the Federal courts have been given jurisdiction, by reason of the diversity of citizenship of the parties, of cases in which questions of State law are in-

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<sup>101</sup> Opportunity for such appointments to the Federal prohibition forces was provided under the Volstead Act (Sec. 38) which authorized the Commissioner of Internal Revenue and the Attorney General of the United States to appoint and employ such employees as they might deem necessary for the enforcement of the act, and which appropriated a large lump sum for such enforcement. Such lump appropriations have been continued in subsequent acts.

<sup>102</sup> The best discussion of this Order is that of Professor James Hart in his article "Some Legal Questions Growing Out of the Executive Order for Prohibition Enforcement" in 13 *Virginia Law Review*, 86. See also report of the special sub-committee of the Senate Committee on the Judiciary to which this Order was referred for consideration as to its legality.

<sup>103</sup> The provisions of the National Constitution regarding the rendition of fugitives from justice, that regarding the full faith and credit that shall be given in each State to the public acts, records, and judicial proceedings of the other States (Art. IV, Sec. 1), and that, according to which the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States (Art. IV, Sec. 2), have for their aim the promotion of this comity and coöperation between the several States of the Union.

volved, the Federal courts have been directed to conform as near as may be to the practice existing in like causes in the courts of the State in which the Federal court sits.<sup>104</sup> In many other cases, which it is not necessary here to mention, the Federal laws have taken cognizance of, and, to the extent constitutionally possible, have permitted the State laws, though differing among themselves, to continue to operate within their several States.<sup>105</sup>

As another instance of Federal and State comity may be mentioned the established practice according to which, in cases in which both Federal and State courts have jurisdiction over the same person or *res*, that court is permitted to continue to exercise its jurisdiction which first becomes seized of the case.<sup>106</sup>

A recent case which illustrates the friendly coöperation of State and Federal authorities is that of *Ponzi v. Fessenden*.<sup>107</sup> In this case the plaintiff, while undergoing imprisonment because of conviction in a Federal court of an offence against a Federal law, was, with the permission of the Attorney General of the United States, produced, upon a writ of habeas corpus from a State court, in a State court and there arraigned, tried, and found guilty of an offence against a law of the State. He filed in a Federal court a petition for a writ of habeas corpus alleging, in substance, that, having been, while imprisoned, within the exclusive jurisdiction of the Federal Government, it had not been constitutional to surrender him into State custody for the purpose of trying him in a State court. The question thus raised having been certified to the Supreme Court, that court held that the action had been constitutional. The language of Chief Justice Taft, in support of this ruling, so admirably states the spirit in which the State and Federal sovereignties should, and constitutionally may, operate, that it deserves to be quoted. He said: "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and en-

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<sup>104</sup> Revised Statutes, 914. As to the constitutionality of this provision, see *Amy v. Watertown* (130 U. S. 301). See also Revised Statutes, Secs. 915 and 916.

<sup>105</sup> As to this, see the next section, dealing with the delegation of Federal legislative power to the States.

<sup>106</sup> For a statement of the grounds for this practice, see *Covell v. Heyman* (111 U. S. 176). In that case the court said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

<sup>107</sup> 258 U. S. 254.



force its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

"One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. . . . Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it."

In Chapter V will be discussed the doctrine that the Federal and State Governments are not allowed to interfere directly with each other's operations by means of taxation or otherwise, and needs here to be noted only the fact that this doctrine has been based, not upon any expressed provision of the Federal Constitution, but upon the general doctrine of comity and coöperation between the Federal and State authorities.<sup>108</sup>

It may furthermore be pointed out that this doctrine of comity and coöperation may be said to be largely responsible for the recognition of the "concurrent" powers of the States, discussed in Section 69, with reference to the regulation of matters placed expressly within the authority of Congress, but which, in the absence of congressional action, are appropriate for State regulation.<sup>109</sup>

#### § 74. Delegation of Federal Powers to the States.<sup>110</sup>

The preceding section has dealt, it will have been observed, with the enforcement by the Federal and State Governments of each other's laws,

<sup>108</sup> Possibly this is not wholly true as to the unconstitutionality of State interference with Federal operations, since the foundation for this inability may be said to rest also upon the underlying doctrine of the supremacy of Federal over State authority; but certainly the converse doctrine that the Federal Government may not interfere with State operations rests only upon a doctrine of comity and coöperation.

<sup>109</sup> In some cases the silence of Congress has been deemed equivalent to a declaration by that body that there shall be no regulation.

<sup>110</sup> For an excellent discussion of this subject, see the article by Professor James D. Barnett, "The Delegation of Legislative Power by Congress to the States," in 2 *American Political Science Review*, 347.

and not with the transfer by the Federal Government to the States or by the States to the Federal Government, of jurisdiction to legislate. Such a delegation of legislative power is forbidden by the general doctrine that a delegated power may not be delegated,—*delegata potestas non potest delegari*. As applied in the field of American constitutional law this doctrine is defended upon the ground that the sovereign people having declared in the Constitutions adopted by them by what government or governmental organ specified powers are to be exercised, it is not permissible that this declaration should be altered or defeated.

Though the absolute character of this rule has never been weakened by declarations of the courts, its operation has, in a number of instances, been avoided by reasoning which, in some cases, has been very fine, if, indeed, not tinged with sophistry. Thus, in a later chapter, dealing with the Commerce Clause, it will be seen that there have been instances in which Congress has permitted the States to act with regard to matters of interstate commerce which, except for such congressional permission, they would have been constitutionally incompetent to regulate. This has been sanctioned by the courts upon the ground that by such permission Congress did not give to the States a jurisdictional authority which they had not previously possessed, but that it merely removed from the exercise of such jurisdiction the obstacle imposed by the presumption that, in default of such permissive declaration by Congress, it was the desire of that body that there should be no regulation.<sup>111</sup>

Elsewhere in the present treatise<sup>112</sup> is discussed the permission given to the States by Congress to tax National Banks in certain specified ways. Here, also, it has been held that this is not a delegation of a Federal authority to the States but merely the removal of an obstacle to the exercise by the States of their constitutional powers of taxation.<sup>113</sup>

There have been repeated instances in which Congress has accepted State laws as its own. But this, of course, has not meant that State laws have been recognized to have a force, *ex proprio vigore*, within a field reserved by the Constitution for Federal legislative action. Mention has already been made of provisions of the original Judiciary Act of 1789 with regard to the adoption by the Federal courts of the practices of the courts in the States in which the Federal courts sit.<sup>114</sup> In the same year Congress pro-

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<sup>111</sup> See *James Clark Distilling Co. v. Western Maryland R. Co.* (242 U. S. 311). In that case the court said: "It is true that regulation which Webb-Kenyon Act [of Congress] contains permits State prohibitions to apply to movements of liquor from one State to another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of State prohibitions would cease the instant the act of Congress ceased to apply." See also *In re Rahrer* (140 U. S. 545).

<sup>112</sup> *Post*, § 94.

<sup>113</sup> *Van Allen v. Assessors* (3 Wall. 573).

<sup>114</sup> Section 20 of the Judiciary Act 1789 provided that "the laws of the several States,

vided that, until it should make further provision, State laws regarding pilots should remain in force.<sup>115</sup> As to this act, the court, in *Gibbons v. Ogden*,<sup>116</sup> said: "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." In *Ex parte Siebold*,<sup>117</sup> when it was objected that the Federal courts had no criminal law under which to punish officers of congressional elections who had violated the duties imposed on them by the State laws, the court said that the State laws "were in effect adopted by Congress."

It has been noted that, in *Wayman v. Southard*<sup>118</sup> it was held that though Congress might adopt as its own existing laws of the States, it might not do this as to State laws which might thereafter be passed.<sup>119</sup>

In a considerable number of cases Congress, while not adopting State laws as its own, has provided that the operation of its own laws in the several States shall be qualified by the laws of those States. Thus the present National Bankruptcy Act provides that "it shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of filing the petition."<sup>120</sup> The Webb-Kenyon Liquor Law<sup>121</sup> made the Federal prohibition of the interstate transportation of intoxicating liquors depend upon whether such liquors were to be received, possessed, sold, or in any manner used, in violation of any law of the States into which they might be taken.

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except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This was proper and defensible upon the ground that the Federal courts, in such cases, were intended to act for the enforcement of State laws,—that they were given jurisdiction in order to provide impartial tribunals in suits between citizens of different States, and not, primarily at least, to apply Federal law. The exceptions to the foregoing practice are discussed, *post*, in Section 825.

In *Wayman v. Southard* (10 Wh. 1), it was held that though Congress had provided, and constitutionally might provide, that the then existing practice and procedure of the State courts should be adopted as the practice and procedure of the Federal courts, it could not be provided by Congress that rules of practice and procedure subsequently adopted by States should be followed by the Federal courts. The Supreme Court said: "if it [Congress] adopts future State laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the State legislatures the power which the Constitution has conferred on Congress."

<sup>115</sup> 1 Stat. at L. 53.

<sup>116</sup> 9 Wh. 1.

<sup>117</sup> 100 U. S. 371.

<sup>118</sup> 10 Wh. 1.

<sup>119</sup> Congress has given to the Federal courts a certain amount of discretionary power to modify their practices and procedures so as to bring them into consonance with changed practices and procedures of the courts of the States in which they sit. 17 Stat. at L. 196.

<sup>120</sup> 30 Stat. at L. 544.

<sup>121</sup> 37 Stat. at L. 699.

By a law enacted October 6, 1917,<sup>122</sup> Congress attempted to overcome the decision of the Supreme Court in *Southern Pacific Co. v. Jensen*<sup>123</sup> by providing that suitors in cases of maritime injuries might claim in the Federal courts the rights and remedies under the workmen's compensation laws of the States. This provision was held unconstitutional by the Supreme Court in *Knickerbocker Ice Co. v. Stewart*<sup>124</sup> on the ground that admiralty law in the United States had been determined to be wholly and exclusively Federal in character, and that, therefore, Congress could not provide that remedies and rights created by the States could, in admiralty causes, which are exclusively within the jurisdiction of the Federal courts, be given effect to in such courts.<sup>125</sup> The court said: "Considering the fundamental purpose in view and the definite end for which such [admiralty] rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others." <sup>126</sup>

By Section 301 of the Revenue Act of 1926 <sup>127</sup> it is provided that from the amounts payable to the Federal Government as an inheritance tax may be deducted, up to eighty per cent of such tax, any inheritance tax levied and collected by a State. In *Florida v. Mellon*<sup>128</sup> this provision was upheld, the court saying: "The contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax." This is true enough, but the actual operation of the Federal law in this case is, it is seen, made largely dependent upon the laws which may happen to exist in the different States, although it cannot, strictly speaking, be said that Congress has adopted as its own these State laws.

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<sup>122</sup> 40 Stat. at L. 395.

<sup>123</sup> 244 U. S. 205.

<sup>124</sup> 253 U. S. 149.

<sup>125</sup> The so-called "saving clause" of the original judiciary act which saved to suitors in admiralty causes "the right of a common-law remedy where the common law is competent to give it," has, of course, reference to the right of suitors to enforce such common-law remedies in common-law suits (as distinguished from admiralty suits) in the State courts.

<sup>126</sup> Justice Holmes dissented, holding that the instant case could be brought within the doctrine of *Clark Distilling Co. v. Western Md. R. Co.* (242 U. S. 311).

<sup>127</sup> 44 Stat. at L. 69.

<sup>128</sup> 273 U. S. 12.

### § 75. State Powers: Curtailment of.

In general it may be said that the States of the Union possess all the constitutional powers not vested by the Federal Constitution in the General Government or not denied to them, expressly or by implication by that instrument. The several States, by their several Constitutions, determine the manner in which or the limitations under which these State powers shall be exercised by their several governments or the departments or branches thereof.

As has already been seen from the discussion of the so-called concurrent jurisdiction of the United States and of the States, the extent to which the States may exercise certain of their powers depends upon the extent to which and the manner in which the Federal Congress has legislated. Thus it has happened, that, without any constitutional redistribution of powers, the States, during recent years, have found their fields of constitutionally possible regulation considerably lessened by reason of the legislative activity of the Congress, especially in the exercise of its right to regulate foreign and interstate commerce.

A second manner in which the States of the Union have found their jurisdictions increasingly curtailed has been by a progressive broadening, by constitutional interpretation, of the scope of certain of the Federal powers. Here, too, the Federal power to regulate interstate commerce has been the Federal power especially concerned, as will abundantly appear in the chapters dealing with that subject.<sup>129</sup>

It must also be confessed that Congress has, upon a number of occasions, exercised its taxing, appropriating, and interstate commerce regulatory powers not for the purpose, principally at least, of raising revenue or controlling interstate trade, but for police purposes with reference to matters that are constitutionally subject to direct regulation only by the States.<sup>130</sup>

Finally, with regard to the increasing subordination of the States to Federal control, may be mentioned the acts of Congress, of which the "Maternity Act" is an instance, and which have been already discussed in connection with the appropriating power of Congress, the substantial effect of which is to induce the States to exercise their reserved constitutional powers in ways, and for purposes, which the Federal Government approves.<sup>131</sup>

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<sup>129</sup> The expanding importance of interstate trade in the economic and industrial life of the United States, as well as a more liberal interpretation of the commerce clause of the Constitution has been responsible for this increase of Federal power at the expense of that of the States.

<sup>130</sup> See, for instance, the act imposing a tax on the issues of State banks; the act of Congress imposing a tax on oleomargarine colored to resemble butter; the act of April 9, 1917, levying a tax on phosphorous matches; the act of August 18, 1917, taxing cotton "futures"; and the Narcotic Act of December 17, 1914. The laws attempting the Federal regulation of child labor, first as a regulation of interstate trade and then as an exercise of the taxing power were held unconstitutional. See *post*, § 590.

<sup>131</sup> See *ante*, § 65.

## CHAPTER IV

### FEDERAL SUPREMACY

#### § 76. National Sovereignty.

In another work <sup>1</sup> the author has discussed the concept of sovereignty in its juristic connotations, and applied the conclusions reached to federally organized States in general and to the United States in particular. It is there shown that sovereignty, as that term is employed in constitutional law, implies supreme law-making power; that this power is, of logical necessity, an indivisible unity, and, therefore, that, in the case of a State apparently composed of a number of united or coöperating States, but two alternatives are possible: either the individual States remain severally sovereign with the result that there is no real central State but only a government that acts as the common agent of the severally sovereign States, or that there is a single sovereign national State, legally omnicompetent, and a number of subordinate political bodies, which may or may not be termed States, but which, juristically viewed, act as agents of the sovereign national State, and possess such political status as they have only within, and as members of, this national body. In the first case, the union is spoken of as a Confederacy, or, to use the German term, a *Staatenbund*; in the second case, the union is described as a Federal State, or *Bundesstaat*. In the Confederacy, the articles of union, whether denominated a Constitution or not, are, in their essential juristic character, an agreement, compact, or treaty between the severally sovereign States. In the Federal State, the fundamental instrument of government is a veritable law embodying the will of the National Government or of its citizens, and operating as the source whence, in last resort, the legal authority or competency of all governmental agencies or organs, whether national or of the individual States, is derived and determined.

That the United States of America is to be constitutionally viewed as a Federal State, that is, as a sovereign national body, there is now no doubt, and has not been since the Civil War. In truth, as will presently appear, the Federal Constitution has been construed in accordance with this view from the date of its establishment, though not, it is to be admitted, without protestations upon the part of those who thought that it should have been regarded from the Confederate point of view. These protestations, however, related rather to the question as to the tribunal which, in last resort, should in all cases have the power to determine the validity

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<sup>1</sup> *Fundamental Concepts of Public Law* (Macmillan, 1924).

of claims of rights, privileges or immunities based upon the Federal Constitution, laws or treaties, and not as the supremacy of those Federal laws, treaties and constitutional provisions over State laws and Constitutions. For there has been no escape from the declaration of Art. VI, clause 2, of the Federal Constitution that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>2</sup>

This federalistic or nationalistic view of the United States Constitution has been fully compatible with the doctrine that, as implied in its terms and the historical circumstances under which it was adopted, and as expressly declared in the Tenth Amendment, the National Government is to exercise only those powers expressly or by necessary implication granted to it, and the States, through their governments, are to exercise all powers not thus delegated to the United States, or expressly or by necessary implication, denied to them.

This division of governmental powers, or, rather, of the right to exercise them, between the National and State Governments has, since the time when the United States Constitution was adopted, been spoken of as a "division of sovereignty." From what has been said, it is clear that this is, and has always been, a juristically improper, and politically unfortunate description. That it is a juristic error springs from the very nature of sovereignty, and that its implications cannot be realized in practice has been consistently and repeatedly shown since the present Constitution was put into operation. This will abundantly appear throughout the present treatise. The States have never been treated upon a basis of equality with the United States, such as would have resulted from a division of sovereignty,—had such a thing been juristically possible,—but, in every instance, whether with reference to the use of the so-called concurrent powers, or to the many instances in which State and Federal powers have, in their exercise, come into conflict with each other, the States have been obliged to yield to the United States. This supremacy of Federal authority over that of the States has resulted from, and its continued enforcement has demonstrated, the sovereignty of the United States.

The maintenance of this supremacy unimpaired, while at the same time preserving to the States their proper autonomy and independence of action, has, however, been a difficult task; and, so long as the Federal form is retained, this task will continue to tax to the utmost the legal and

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<sup>2</sup> As to the constitutional right of the Federal Supreme Court to review decisions of the State courts involving claims of Federal rights, privileges or immunities, see *post*, §§ 809 *et seq.*

political abilities of our courts and political bodies. With a quite proper motive those who have controlled the public actions of the States, and those who have guided the activities of the United States, have sought for their respective governments the greatest possible constitutional power and independence, and, therefore, have not hesitated to occupy debatable territory. Thus, without there being any denial of the supremacy of the Federal law, when operating within its proper field, or of the right of the Federal Supreme Court to determine, in final resort, the extent of that proper field, frequent conflicts have resulted. These conflicts in their many and varied forms furnish much of the material for the present treatise, and they will be severally considered in their logical order. It will not be without value, however, to review in this general chapter some of the more important cases in which the supremacy of Federal over State law has been generally and broadly asserted.

The general statement may be made that, since the beginning of our present Government, in no instance has the Federal Supreme Court failed to assert the supremacy of the Federal power when its authority has been attacked by the States. In 1793 the court upheld its right under the Constitution, as it then stood, to entertain a suit against the State of Georgia brought by a citizen of another State.<sup>3</sup> The next year the court clearly intimated that it would disregard a State law in conflict with a Federal treaty.<sup>4</sup> The supremacy of Federal law was again asserted the next year in *Penhallow v. Doane*,<sup>5</sup> and in 1796 in *Ware v. Hylton*.<sup>6</sup> In *Calder v. Bull*<sup>7</sup> the doctrine was definitely asserted, though its application was not found necessary, that a State law in conflict with the Federal Constitution would be disregarded. In 1809, in *United States v. Peters*,<sup>8</sup> this action became necessary and the doctrine was applied, Chief Justice Marshall speaking for the unanimous court, saying: "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the Constitution becomes itself a solemn mockery; and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, as well as the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union and in asserting consequences so fatal to themselves. . . . The State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause." "It will be readily conceived," the great Chief Justice concluded, "that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without

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<sup>3</sup> *Chisholm v. Georgia* (2 Dall. 419).

<sup>4</sup> *Georgia v. Brailsford* (3 Dall. 1).

<sup>5</sup> 3 Dall. 54.

<sup>6</sup> 3 Dall. 199.

<sup>7</sup> 3 Dall. 386.

<sup>8</sup> 5 Cr. 115.



extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded."

In 1810 and 1812 State laws were again held void by the Supreme Court because in conflict with the Federal Constitution.<sup>9</sup> Finally in the great case of *McCulloch v. Maryland*,<sup>10</sup> decided in 1819, not only was a State law held void, but the general doctrine declared that the State cannot, in the exercise of its reserved powers, even of the highest of them, interfere with the operation of a Federal agency even though that agency be one of convenience and not of necessity to the United States. "The States have no power," it was declared, "by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

In *Martin v. Hunter's Lessee*,<sup>11</sup> decided in 1816, and in *Cohens v. Virginia*,<sup>12</sup> decided in 1821, the Supreme Court upheld its authority to review, on writs of error, decisions of State courts adverse to alleged Federal rights, the exercise of this jurisdiction having been provided for by the famous twenty-fifth section of the Judiciary Act of 1789. Justice Story who spoke for the court in *Martin v. Hunter's Lessee*, said: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

In *Cohens v. Virginia*,<sup>13</sup> Chief Justice Marshall, speaking for the court, said: "If it could be doubted, whether from its nature it [the National Government] were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' This is the authoritative language of the American people, and, if the gentlemen please, of the American States. . . . The people made the Constitution and the people can unmake it. . . . But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempts of any of the parts to exercise it is usurpa-

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<sup>9</sup> *Fletcher v. Peck* (6 Cr. 87); *New Jersey v. Wilson* (7 Cr. 164).

<sup>10</sup> 4 Wh. 316.

<sup>11</sup> 1 Wh. 304.

<sup>12</sup> 6 Wh. 264.

<sup>13</sup> 6 Wh. 264.

tion, and ought to be repelled by those to whom the people have delegated the power of repelling it. . . . The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of wisdom to attempt. We think they have attempted it."

The importance of the doctrine that was emphatically declared in these two cases it is impossible to exaggerate. This the upholders of States' Rights clearly saw. Thus Calhoun later wrote: <sup>14</sup> "The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy. It would be a waste of time to undertake to show that an assumption that would destroy the relation of co-ordinates between the government of the United States and those of the several States,—which would enable the former, at pleasure, to absorb the reserved powers and to destroy the institutions, social and political, which the Constitution was ordained to establish and protect, is wholly inconsistent with the federal theory of government, though in perfect accordance with the national theory. Indeed, I might go further and assert, that it is, of itself, all sufficient to convert it into a national, consolidated government."

During the same year that the case of *McCulloch v. Maryland* was decided, two other State laws were held void by the Supreme Court, one of New York, in *Sturges v. Crowninshield*,<sup>15</sup> and one of New Hampshire in *Dartmouth College v. Woodward*.<sup>16</sup>

In 1824, in *Osborn v. Bank of the United States* <sup>17</sup> the attempt of Ohio to tax the Federal bank was declared unconstitutional. In 1829, in *Weston v. Charleston*,<sup>18</sup> a municipal tax on stock of the United States held by citizens of the city of Charleston was held invalid. In 1824, in the case of *Gibbons v. Ogden*,<sup>19</sup> was begun that long line of decisions which has established the power of the United States to regulate interstate commerce free from State interference—an authority the exercise of which has done so much to increase the actual power and influence of the National Government. In this case a law of the State of New York was held void.

In 1823, a law of Kentucky was held of no force by the Federal court,<sup>20</sup> and in 1830 a law of Missouri received similar treatment.<sup>21</sup> In 1832 in

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<sup>14</sup> *Discourse on the Constitution and Government of the United States*. Works, I, 338.

<sup>15</sup> 4 Wh. 122.

<sup>19</sup> 9 Wh. 1.

<sup>16</sup> 4 Wh. 518.

<sup>20</sup> *Green v. Biddle* (8 Wh. 1).

<sup>17</sup> 9 Wh. 738.

<sup>21</sup> *Craig v. Missouri* (4 Pet. 410).

<sup>18</sup> 2 Pet. 449.

*Worcester v. Georgia*,<sup>22</sup> an act of the State of Georgia was held void, but the Supreme Court failed to secure the release of the plaintiff who had been imprisoned under it. This failure was due, however, not to the weakness on part of the Federal Government but to the refusal of the President to lend his executive aid.

From 1835 to the outbreak of the Civil War there can be no question but that the Supreme Court of the United States exerted a much less potent influence in solidifying and expanding the Federal power than it had exercised during the thirty-five years preceding. During the two terms of office of Jackson, five vacancies occurred in the Supreme Court, among them that of the Chief-Justiceship to which Taney was appointed in 1835. The effect of the new appointments upon the views of the court was shown almost immediately. In the case of *Briscoe v. Bank of Kentucky*,<sup>23</sup> which had been argued just before the death of Marshall, the issue by the bank of bills of credit had been held unconstitutional. A rehearing being granted and the case coming on for argument under Taney, the action of the bank was sustained and the previous decision reversed. The decision marked the beginning of a new era in the history of constitutional interpretation. Up to this time the court had, upon all possible occasions, upheld the General Government in the exercise of its powers, and had held the States strictly to the obligations imposed upon them by the Constitution. Now, however, it began if anything to lean the other way. In *Briscoe v. Bank of Kentucky*, departing from its former practice, by an extremely loose interpretation of a constitutional limitation that had been laid upon the States, it rendered practically nugatory one of the provisions of the Constitution. Other decisions similarly favorable to States' Rights followed. In the case of *City of New York v. Miln*,<sup>24</sup> a State law was sustained which might easily have been held an interference with the Federal control of interstate commerce. In *The Charles River Bridge Co. v. Warren Bridge Co.*<sup>25</sup> a doubtful State law was again upheld. In the License cases<sup>26</sup> interpretations of the Commerce Clause favorable to the States were given. In *Kentucky v. Dennison*<sup>27</sup> it was held that though the Federal Constitution made it a duty of a State to surrender to another State a fugitive from justice from that State, there was no constitutional means by which the Federal Government could compel the performance of that duty by the officials of the State. In all these cases the States were favored at the expense of the authority of the General Government.

In 1841, in *Prigg v. Pennsylvania*,<sup>28</sup> a State law attempting the regulation of the return of fugitive slaves was held unconstitutional and void on

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<sup>22</sup> 6 Pet. 515.

<sup>23</sup> 11 Pet. 257.

<sup>24</sup> 11 Pet. 102.

<sup>25</sup> 11 Pet. 420.

<sup>26</sup> 5 How. 504.

<sup>27</sup> 24 How. 66.

<sup>28</sup> 16 Pet. 539.

the ground that this subject was wholly withdrawn from the control of the States. Taney, however, though concurring with the majority in holding unconstitutional the particular law in question, took pains to assert that there was no constitutional incompetence on the part of the State to pass laws the intention and actual effect of which were to assist the Federal Government in the capturing and returning of fleeing negroes.

Regarding the attitude of the Supreme Court during this period, the important fact is to be noticed that, though it threw the weight of its influence upon the side of the States so far as concerned a liberal interpretation of the powers reserved to them by the Constitution, not once, in the slightest measure, did it, during these years, any more than it had done in the years preceding, intimate that the actual legal and political supremacy was not vested in the National Government. The position of Taney and of the court upon this point was clearly shown in the judgment rendered and in the opinion delivered in the case of *Ableman v. Booth*,<sup>29</sup> decided in 1859. The facts of this case were these: Booth had been tried in a lower Federal court for a violation of the Federal Fugitive Slave Law of 1850, and had been found guilty and sentenced to imprisonment. The highest court of the State of Wisconsin, however, stepped in, disregarded this judgment and released the prisoner. Not only this, but it went on to declare that its decision, thus rendered, was subject to no appeal and was conclusive upon all the courts of the United States; and when a writ of error from the United States Supreme Court directed to the Wisconsin court was issued, the clerk of the State court replied to it that he had been directed to make no return, and refused to make up and send a record of the case to the Federal court. Thereupon, the Attorney General of the United States filed in the Supreme Court of the United States an uncertified record which it was ordered should be received as though returned by the clerk of the Wisconsin court. Having thus got the case before it, despite the resistance of the State, the decision of the Supreme Court thereupon was an emphatic condemnation of the State's action. "No State, judge or court," declared Taney who rendered the opinion of the court, "after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the State, in form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."

From the foregoing brief review it is thus seen that, prior to the Civil War, the supremacy of the Federal law had been sustained under a wide

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<sup>29</sup> 21 How. 506; 16 L. ed. 169.

variety of circumstances, and that the resulting subordinate status of the States had been made fully evident. That status the people of certain of the Southern States in 1861 decided no longer to support, and in defence of their views, declared their respective Commonwealths independent of the Union, and, in support of this independence, resorted to the arbitrament of war. That this secession was an illegal act, and that, therefore, the seceding States, from the constitutional viewpoint, never were out of the Union, has repeatedly been declared by the Supreme Court. In *Texas v. White*<sup>30</sup> the Union was declared to be "an indestructible Union composed of indestructible States." The opinion continued: "When, therefore, Texas became one of the United States, she entered into an indissoluble relation. . . . The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. The union between Texas and the other States was as complete, as perpetual and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States. Considered, therefore, as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union."

In *Knox v. Lee*<sup>31</sup> the court said, speaking through the mouth of Justice Bradley: "The doctrine so long contended for, that the Federal Union was a mere compact of States, and that the States, if they chose, might annul and disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the General Government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally effected by the national power, as it had often been before by overwhelming argument. . . . The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality."

#### § 77. Coercion of the States.

In a Confederacy which is, in effect, a league of completely sovereign States, such coercion as it may be necessary for the central power to apply, may, in certain cases, be directed directly against the States as such.

In a Federal State, such as the United States is now agreed to be, the

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<sup>30</sup> 7 Wall. 700.

<sup>31</sup> 12 Wall. 457.

supremacy of the national authority is never maintained by direct action against its member Commonwealths, but is exhibited in its authority to execute its will upon all persons subject to its jurisdiction, anything in the Constitution or laws of any State to the contrary notwithstanding, and irrespective of what may be the opinions and efforts of those exercising the political powers of those States.<sup>32</sup>

The individual Commonwealths, having a political status only as members of the Union, have not the legal power to place themselves, as political bodies, in opposition to the national will. Their legislatures, their courts, or their executive officials may attempt acts unwarranted by the Federal Constitution or Federal law, and they may even command that their citizens generally shall refuse obedience to some specified Federal laws or the Federal authorities generally, but in all such cases, such acts are, legally viewed, simply void, and all individuals obeying them subject to punishment as offenders against national law. The fact that their respective States have directed them to refuse obedience or to offer resistance to the execution of the Federal laws can afford them no immunity from punishment, for no one can shelter himself behind an unconstitutional law, such a law being, in truth, as we have seen, not a law at all, but only an unsuccessful attempt at a law.

Thus President Lincoln, in his first inaugural message, assumed the correct constitutional position when he declared that the Federal Government could not wage public war against a State, not, however, because of a lack of constitutional authority to maintain in every respect its supremacy, but because from the very nature of the Union a State, *qua* State, could not place itself in a position where coercion could be applied to it. After an argument tending to show the sovereign character of the Union, and that it was intended to be perpetual, he declared: "It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances. I therefore consider that, in view of the Constitution and the laws, the Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. . . . In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national authority. The power con-

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<sup>32</sup> However, as to the right of the Federal courts to entertain suits between States and to render judgments against them which may be enforced by writs of execution, see Chapter LXXIX, "The Suability of the States." This coercion of the States as such is, however, not so much for the purpose of maintaining the Federal supremacy, as for securing, through Federal agencies, justice as between the States and individual citizens, or between the States themselves.

ferred upon me will be used to hold, occupy and possess the property and places belonging to the Government and to collect the duty and imposts; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere."

In taking this position Lincoln had to treat the war, when it began, as merely an insurrection in which coercion and punishments were to be applied to individuals. Thus, he began his Proclamation of April 15, 1861, in which he called for seventy-five thousand of the militia of the States, by saying: "Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings:" and closed by commanding "the persons composing the combinations aforesaid to disperse and retire peaceably to their respective abodes within twenty days from this date."

As further showing the theory as to the nature of the contest that was held by the National Government is the fact that Congress did not "declare war" against the South, or, when the struggle was over, enter into a treaty of peace with the Southern Confederacy. The United States did not recognize that the Confederacy had or could have a standing as a political power with which it might deal as with a foreign State. One after another, the surrender of his forces by each Confederate general was accepted as an act of war and thus the Confederacy left to collapse and disappear without any formal, official act to mark its demise.

The possession by the Federal Government of full power to protect any right and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or State officials, acting with or without the authority of State law to the contrary notwithstanding, has been uniformly asserted by the Supreme Court whenever such an assertion has been necessary. Thus, in 1824, in the case of *Osborn v. Bank of the United States*,<sup>33</sup> Chief Justice Marshall met the argument that the suit, being against one of its officials and based upon acts committed by him in his official capacity, was in fact a suit against the State of Ohio, one, therefore, which, under the Eleventh Amendment, the court was without authority to try, by declaring: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to all cases perfectly clear in themselves; to cases where the [National] Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law, void in itself, because repugnant to the Constitution, may arrest the execution of any law of the United States. It maintains that if a State shall impose a fine or penalty on any

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<sup>33</sup> 9 Wh. 738.

person employed in the execution of any law in the United States, it may levy that fine or penalty by a ministerial officer, without the sanction of even its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the [National] Government. . . . The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws." That Marshall answered this question in the affirmative needs not be said.

The attitude of the Federal Supreme Court in the case of *Ableman v. Booth*, decided in 1859, has already been mentioned. Again, after the Civil War, the court said, when confronted by the proposition that because the United States was without any general criminal jurisdiction it might not punish criminally individuals who had violated certain of its laws relating to congressional elections: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and power of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."<sup>34</sup>

In the *Debs* case,<sup>35</sup> a case growing out of the great railway strike of 1894, the plenitude of the Federal power was emphatically stated. Speaking of the right of the National Government to protect, by armed force if necessary, interstate commerce and the transportation of the mails, the court said: "If the inhabitants of a single State or a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution of such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was

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<sup>34</sup> *Ex parte Siebold* (100 U. S. 371). In *United States v. Reese* (92 U. S. 214), 1875, the court said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." And in *Strauder v. West Virginia* (100 U. S. 303), the court said: "A right or an immunity, whether created by the Constitution, or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

<sup>35</sup> *In re Debs* (158 U. S. 564).



known and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the Nation in these respects would be at the absolute mercy of a portion of the inhabitants of a single State. But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

In the Minnesota Rate cases <sup>36</sup> the court said: "There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. . . . The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. The conclusion necessarily results from the supremacy of the national power within its appointed sphere."

#### § 78. Conclusion.

The foregoing cases sufficiently illustrate the general principle of the supremacy of the Federal law. The maintenance of this principle, by the exemption of Federal agencies from State interference by taxation, by means of Federal writs of habeas corpus and of injunction to State authorities, and by the removal of suits from State to Federal courts, will be discussed in the next succeeding chapters.

#### § 79. State Regulations and Federal Functions.

How jealous the Federal courts are of any State action which in any way interferes with or hinders the free exercise of Federal functions, is shown in the many cases in which have been declared void laws, which, though passed by the States in the exercise of their taxing, police, commercial, and other powers, have been deemed to interfere with the exercise by the United States of its constitutionally granted powers. Many of these cases will be considered later on in connection with the discussion of these specific State powers, but enough of them will be here spoken of to show the general doctrine.

In North Dakota *ex rel. Flaherty v. Hanson* <sup>37</sup> the court held invalid

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<sup>36</sup> *Simpson v. Shepard* (230 U. S. 352).

<sup>37</sup> 215 U. S. 515.

a State law which required that receipts for the payment of the Federal internal revenue tax upon the business of selling intoxicating liquors should be registered and published at the holder's expense. This law was attempted to be defended upon the ground that it was a proper police measure, but the Supreme Court said: "We see no escape from the conclusion that it immediately and directly places a burden upon the lawful taxing power of the United States, or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax, and wholly without reference to the doing by the person of any act within the State which is subject to the regulating authority of the State. That the attempted exertion of such a power is repugnant to the Constitution of the United States is so elementary as to require nothing but statement." <sup>38</sup>

In *United States v. Snyder*,<sup>39</sup> the court held that the validity of a lien upon real estate for taxes due the United States under its internal revenue laws could not, by State law, be made dependent upon the recording of such lien in the mortgage records of the State. The court said: "If the United States proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a State statute prescribing that such a tax must be assessed and recorded under State regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of State legislation."

In *First National Bank in St. Louis v. Missouri*,<sup>40</sup> by not wholly satisfactory reasoning, the court held that National banks had not been given by Congress the right to establish branches, and that a State, whose laws forbade the maintenance of branch banks might, by proceedings in the nature of quo warranto, compel the discontinuance of such a branch of a National bank. That the court gave a proper construction of the Federal banking laws is not to be contested, but that the State, and not the Federal Government, should be held competent to apply its law, and to take action in the premises is not so clear. "Clearly," said the court in its majority opinion, "the State statute, by prohibiting branches, does not frustrate the purpose for which the [National] bank was created or interfere with the discharge of its duties to the government or impair its efficiency as a Federal agency. . . . The State statute as applied to National banks is, therefore, valid, and the corollary that it is obligatory and enforceable necessarily results unless some controlling reason forbids; and, since the

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<sup>38</sup> With reference to the facts of this case it is to be observed that a long line of decisions had held that the payment of the Federal excise tax did not give to the payor authority to sell liquor—it did not operate as a Federal license. License Tax cases (5 Wall. 462).

<sup>39</sup> 149 U. S. 210.

<sup>40</sup> 263 U. S. 640.

sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter."

To the author of the present treatise, it by no means is clear that the State law, as applied to National banks, was not an interference with them. Granting, as the court found, that Congress had given to them no right to establish branches, it would seem that the proper and only party qualified to bring quo warranto proceedings would have been the Federal Government. This is substantially the ground taken in the minority opinion of Justice Van Devanter, which was concurred in by the Chief Justice and Justice Butler. Justice Van Devanter referred to the holding of the court in *Massachusetts v. Mellon*,<sup>41</sup> and to *Tarble's case* <sup>42</sup> in which the court had said with reference to the independence in action of the Federal and State Governments, "Neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority." Reference was also made to *Territory v. Lockwood*,<sup>43</sup> in which the court had said: "The right of the Territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the Territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the States as to the Federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation."<sup>44</sup>

In *First National Bank v. Fellows* <sup>45</sup> the court upheld the constitutionality of the authority given to the Federal Reserve Board by the act of December 23, 1913, to grant to National banks applying therefor, and when not in contravention of State or local law, the right to act as trustees, executors, administrators, or registrars of stocks and bonds under such rules and regulations as the Board might prescribe. The State court from which the case had come by writ of error had held that there was no natural connection between the business of banking and the carrying on of Federal fiscal operations upon the one hand, and the settling of estates and acting as trustee of bondholders on the other hand, and, that, therefore, the Federal provision in question was "a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as

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<sup>41</sup> 252 U. S. 447.

<sup>42</sup> 13 Wall. 397.

<sup>43</sup> 3 Wall. 236.

<sup>44</sup> See also Justice Van Devanter's dissent in *First National Bank v. Fellows* (244 U. S. 416).

<sup>45</sup> 244 U. S. 416.

well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors, and administrators;”—in other words, that the case was not covered by the doctrine of *McCulloch v. Maryland* <sup>46</sup> and *Osborn v. Bank of United States*.<sup>47</sup> This ruling of the State court, the Supreme Court held unsound, in an opinion which reiterated the constitutional right of Congress to vest in Federal agencies powers which, though considered, in themselves, as private and subject ordinarily to State control, are incidental to the successful discharge by such Federal agencies of their public functions.

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<sup>46</sup> 4 Wh. 316.

<sup>47</sup> 9 Wh. 738.

## CHAPTER V

### THE MAINTENANCE OF FEDERAL SUPREMACY—THE FREEDOM OF FEDERAL AGENCIES FROM INTERFERENCE OR CONTROL BY THE STATES AND VICE VERSA: FEDERAL EMINENT DOMAIN AND THE STATES

#### § 80. State Taxation of Federal Governmental Agencies.

The successful maintenance of a Federal government, under any circumstances a most difficult task, is an especially difficult one in the United States where Federal functions are exclusively performed by Federal agents and organs, and State functions by State agents and organs. This has necessitated the maintenance of a complete machinery of government for the United States, and, similarly, a complete political organization for each of the member States of the Union. This arrangement carries with it the general doctrine that the States may not in any wise interfere with the operation of a Federal organ or with the exercise by a Federal agent of his official functions; and that, conversely, the Federal Government may not interfere with the operation of a State agency or the official actions of State officials when acting within the constitutional limits reserved to the States. Illustrations of these general principles will appear throughout this treatise. Their scope and significance may, however, be best exhibited in their application to the Federal and State taxing power, and to a discussion of this especial phase of the subject this and the next succeeding paragraphs will be devoted.

That a State may not, in the exercise of its reserved powers, interfere with a Federal governmental agency was settled once for all by the decision of the Supreme Court in *McCulloch v. Maryland*.<sup>1</sup> This case was all the stronger in that the Federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the

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<sup>1</sup> 4 Wh. 316.

right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a Federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate Federal power. In other words, the State took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one. In the course of his opinion rendered in this case Marshall said: "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. These powers are not given by the people of a single State. They are given by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme." Then, after referring to the fact that the power to tax might be used to destroy, he continued: "That there is a plain repugnance in conferring on one government power to control the constitutional measures of another, which other with respect to those very measures is declared supreme over that which exerts the control . . . [is a] proposition not to be denied. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial processes; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the American States. . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

These are the general propositions in support of which the case of *McCulloch v. Maryland* has been many times quoted. In point of fact, a close examination of the facts of the case and of Marshall's entire opinion shows that the invalidity of the law of Maryland was rested upon grounds

other than the mere fact that it would or might operate as an impediment to the operation of a Federal agency. In the first place, the State law was discriminatory in character, that is, it did not impose upon similar State banks the tax burden that it sought to place upon the Federal bank. It would, therefore, have been possible, had the Supreme Court so desired, to have declared the law void solely upon this ground and therefore to have established no broader doctrine than that a State may not, in the exercise of its taxing powers, discriminate against a Federal agency.<sup>2</sup> It is, indeed, possible to argue, that, strictly applying the doctrine of precedents as it is known to American jurisprudence, this is all that case can be actually held to have decided. In fact, however, as the foregoing quotations have shown, the court, speaking through Marshall, declared that it held the State law void upon the ground that any tax whatsoever, whether discriminatory or not, upon the operations of a Federal agency, is an unconstitutional interference with the existence or operation of that agency.

Marshall also, in arguing the invalidity of the Maryland law, laid considerable stress upon the fact that it was an attempt to levy a tax upon an object that lay outside the inherent taxing powers of the State, that is, that the law was void not simply because it was an interference with a Federal agency, but because the taxing power of the State was, by its own inherent nature, incompetent to include the bank within its scope. Admitting, as a general proposition, that the power of a State to tax is not confined to the people and property of the State, but extends to every object brought within its jurisdiction, Marshall asked: "But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All objects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission, but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not."

In *Osborn v. Bank of the United States*,<sup>3</sup> decided in 1824, the question of the power of a State to tax the Bank of the United States was reopened by the State of Ohio, and a strenuous attempt made to have the Supreme Court of the United States modify the views it had expressed in *McCulloch v. Maryland*. The argument was used that a distinction should be made between the bank as a fiscal agent of the Government and as a

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<sup>2</sup> The Maryland act was entitled "An Act to impose a tax on all banks or branches thereof in the State of Maryland, not chartered by the legislature (of Maryland)."

<sup>3</sup> 9 Wh. 738.

private company trading with individuals for its own advantage; and that so far as it existed and operated in this latter capacity it might be taxed and otherwise regulated by the States. The Supreme Court held, however, that in practice the distinction had no existence. "To tax its faculties, its trade, and occupation," it declared, "is to tax the bank itself. To destroy or preserve the one is to destroy or preserve the other." The opinion continued: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. . . . The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact the business more beneficially. . . . Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of *McCulloch v. The State of Maryland*, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the Constitution, and, therefore, void." <sup>4</sup>

In *Smith v. Kansas City Title and Trust Company* <sup>5</sup> the court, with reference to the banks and their bond issues, provided for by the Federal Farm Loan Act of July 17, 1916, said: "Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

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<sup>4</sup> The character of the State law involved in this case was shown by its title which was: "An Act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this State, without being allowed to do so by the laws thereof."

<sup>5</sup> 255 U. S. 180.



In *Williams v. Talladega*,<sup>6</sup> it was held that the acceptance by a telegraph company of certain rights provided for by the Federal Act of July 24, 1866, with reference to the construction, maintenance and operation of telegraph lines over the military and post roads of the United States, did not give to the company a Federal franchise or operate to render it a Federal agency so as to prevent a State from levying a license tax upon the company's right to do a local business within the State. After reviewing earlier cases,<sup>7</sup> the court said: "These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders, or from imposing a license tax upon the right to do a local business within the State."<sup>8</sup>

However, in this case the State law was held void upon the ground that there had not been exempted from its operation the sending of United States government messages by the company.<sup>9</sup> This holding was upon the authority of *Western Union Teleg. Co. v. Texas*,<sup>10</sup> in which the court had said: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. . . . As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and therefore void."

#### § 81. State Taxation of Property of Concerns Rendering Federal Services.

In *McCulloch v. Maryland* and *Osborn v. Bank of the United States*, the State had attempted to levy a tax in the nature of a franchise tax, upon the operations of the Federal bank. In the Maryland case Chief Justice Marshall said: "The opinion does not deprive the State of any

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<sup>6</sup> 226 U. S. 404.

<sup>7</sup> *Postal Teleg. Cable Co. v. Charleston* (153 U. S. 692); *Western Union Teleg. Co. v. Missouri* (190 U. S. 412); *Western Union Teleg. Co. v. Richmond* (224 U. S. 160).

<sup>8</sup> The constitutional inability of the State to impose a license tax upon the right to do an interstate or foreign commerce business of course arises from the commerce clause of the Constitution.

<sup>9</sup> The act of 1866 obligated the company to give priority to all government messages over all other business, and to transmit them at rates annually fixed by the Postmaster General.

<sup>10</sup> 105 U. S. 460.

resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

This suggestion of Marshall of a power on the part of the States to tax the property of a Federal corporation or agency received judicial application in *Thomson v. Union Pacific R. Co.*,<sup>11</sup> in which it was held that, in the absence of any legislation of Congress directing otherwise, the property of a railroad company, chartered by a State, but performing Federal services, might be taxed by the State. Chief Justice Chase, speaking for a unanimous court, said: "We do not think ourselves warranted in extending the exemption [from State taxation] established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding the property within State jurisdiction and under State protection. . . . We think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means, taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."<sup>12</sup>

In *Thomson v. Union Pacific R. Co.* the railroad company concerned, although performing Federal services, was chartered by the State. In *Union Pacific R. Co. v. Peniston*,<sup>13</sup> the same doctrine was applied to a company chartered by Congress. This fact, it was held, did take the

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<sup>11</sup> 9 Wall. 579.

<sup>12</sup> The objection to sustaining the principle that the property of corporations performing Federal services is by that fact exempt from State taxation, is stated by the court as follows: "We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. . . . It may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments."

<sup>13</sup> 18 Wall. 5.

case out of the rule laid down in the earlier case. "We do not perceive," the court declared, "that this presents any reason for the application of a rule different from that which was applied in the former case. . . . The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas." "It is manifest," the court continued, "that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

**§ 82. Principles of Legal and of Economic Incidence Distinguished.**

It will be seen from the language thus quoted from *Union Pacific R. Co. v. Peniston* that, as to instrumentalities or agencies not primarily Federal agencies, but rendering to some extent or in certain respects Federal services, there is applied what may be termed the principle of "economic incidence." That is, a State tax is invalid only when and in so far as, it imposes an economic burden that may be conceived to hinder the exercise of their Federal functions by such instrumentalities. In the case, however, of instrumentalities that are primarily Federal agencies, and only incidentally exercising other powers, the principle of what may be termed "legal incidence" is applied, namely, that, without regard to its economic effect, the State tax is invalid unless Congress has consented to its imposition. Thus, in *Owensboro National Bank v. City of Owensboro*<sup>14</sup> it was declared that property of national banks, organized under a Federal statute, is absolutely exempt from State taxation except in so far as Congress has expressly waived this immunity. In *Davis v. Bank*<sup>15</sup> the court had said: "National Banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the permanent authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." "It follows, then, necessarily from these conclusions," the court said in the *Owensboro* case, "that the respective States would be wholly without power to levy any tax, either

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<sup>14</sup> 173 U. S. 664.

<sup>15</sup> 161 U. S. 275.

direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

In *National Bank v. Commonwealth*<sup>16</sup> the Supreme Court again resisted a claim attempted to be made under the authority of the doctrine of *McCulloch v. Maryland*, that the banks as governmental agencies are wholly exempt from the control of State law even with reference to matters unconnected with the services performed by them as Federal agencies. The court declared: "It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. The limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as the legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal services which will interfere with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family, or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the [Federal] banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State incapacitates the bank from discharging their duties to the government that it becomes unconstitutional."

In *Gromer v. Standard Dredging Co.*,<sup>17</sup> it was urged that machinery and tools used in performance of a contract with the United States were agencies of the Federal Government and as such exempt from local taxation. This allegation the court declined to accept.<sup>18</sup>

<sup>16</sup> 9 Wall. 353.

<sup>17</sup> 224 U. S. 362.

<sup>18</sup> Citing *Baltimore Shipbuilding and Dry Dock Co. v. Baltimore* (195 U. S. 375) in which it was held that land conveyed by the United States to a corporation for dry dock purposes could not be held an agency of the Federal Government because of a provision for forfeiture under certain conditions to the United States.

**§ 83. Interstate Commerce: State Taxation of.**

The doctrine of economic incidence, as will later be seen, is applied generally in the matter of State interference with foreign and interstate commerce.<sup>19</sup>

**§ 84. State Taxation of Federal Franchises.**

A franchise to be or to act as a corporation granted by a State may be taxed by a State as a piece of intangible property. But franchises or other rights derived from the Federal Government may not be taxed as such by the States nor any hindrances placed by the States upon their exercise. In *California v. Central Pacific R. Co.*<sup>20</sup> one of a series of cases dealing with the Pacific Railroads, the court said: "These franchises were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy, nor abridge them, nor cripple them by onerous burdens. . . . Can it tax them? It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot."

As will later be seen, the rule is not the same with reference to taxation by the Federal Government of corporate franchises granted by the States.<sup>21</sup> The distinction is this. Congress has power to grant corporate franchises only as means necessary and proper for carrying into effect Federal powers. Therefore, a Federally chartered corporation is necessarily a Federal agency, and, as such, exempt from State control or interference whether by taxation or otherwise. This is not true as regards corporations chartered by the States. They may or may not be State agencies, and, when they are not, they, their property or franchises, are subject to Federal taxation.

**§ 85. State Taxation of Patent Rights.**

In conformity with the doctrine already stated, it has been held that, while the States may tax the capital employed in the manufacture of copyrighted or patented articles, as well as the tangible property embodied in these articles, they may not exact a fee as a condition precedent to the exercise of these Federally granted rights, nor can they tax the intangible rights themselves as property.<sup>22</sup>

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<sup>19</sup> See *post*, Chapter LX.

<sup>20</sup> 127 U. S. 1.

<sup>21</sup> Chapter LX. See especially *Flint v. Stone Tracy Co.* (220 U. S. 107).

<sup>22</sup> *Crown Cork and Seal Co. v. Maryland* (87 Md. 687); *People v. Assessors* (156 N. Y. 417); *People v. Roberts* (159 N. Y. 70). In these cases it is held that if the tax is upon the corporate property generally, or even upon the shares of stock evidencing that property, the value of the patent rights must be deducted. If, however, the tax be

In *Patterson v. Kentucky* <sup>23</sup> the court held that a State statute regulating the inspection and gauging of oils was a mere police regulation and did not interfere with a patent right under which a certain oil was manufactured. A similar conclusion was reached in *Webber v. Virginia*.<sup>24</sup> In *Allen v. Riley* <sup>25</sup> was held valid a State law which required one selling a patent right in any county in the State, to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent, and that any written obligation given for the purchase price of a patent right should contain the words "given for a patent right." These, it was held, were proper police requirements. The court said: "We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. . . . The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil, and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so." <sup>26</sup>

Of course no State may, in the exercise of its police or other powers, in any way discriminate against patented articles.<sup>27</sup>

#### § 86. State Taxation of Federally Licensed Occupations.

Where, by Federal license, an occupation has been authorized by the United States, enjoyment and employment of the license may not be restrained by a State. Thus in *Moran v. New Orleans* <sup>28</sup> was held void an ordinance of the city of New Orleans imposing a license tax on certain vessels engaged in foreign commerce and duly enrolled and licensed under act of Congress. The court said: "The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from the constitution and laws of the United States. The Louisiana statute

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upon the shares of stock to the holders, or is upon the franchise of the corporation, the fact that patent rights are included within the assets of the company is not material. Cf. *Judson, Taxation*, Sec. 33.

<sup>23</sup> 97 U. S. 501.

<sup>24</sup> 103 U. S. 334.

<sup>25</sup> 203 U. S. 347.

<sup>26</sup> Justices White and Day dissented.

<sup>27</sup> *Ozan Lumber Co. v. Union Co. Nat. Bank* (145 Fed. 344).

<sup>28</sup> 112 U. S. 69.

declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boat in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. . . . In such an opposition, the only question is which is the superior authority; and reduced to that it furnishes its own answer."

In *Harman v. Chicago* <sup>29</sup> this doctrine was approved and again applied.

#### § 87. State Taxation of Federal Salaries.

That the salary or other emoluments of office of Federal officials may not be taxed by the States has not been questioned since the doctrine was first declared in *Dobbins v. Commissioners*.<sup>30</sup> "The powers of the National Government," the court said in that case, "can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. . . . The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. . . . Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect."

#### § 88. State Taxation of Federal Property.

The principle that property belonging to the United States is not taxable by the States in which it is situated did not receive final judicial affirmation until 1885 in *Van Brocklin v. Tennessee*.<sup>31</sup> Prior to this decision it had quite generally been taken for granted that Federal property was thus exempt from State taxation, but in a number of cases Congress would seem to have implied that it was not confident upon this point since it incorporated into enabling acts for the admission of territories into the Union as States, the requirement that after admission the property of the United States should be exempt from State taxation. The effect of the decision in *Van Brocklin v. Tennessee* was, of course, to hold that these provisions were declaratory merely, and, therefore, superfluous. The fact that the lands concerned in this Tennessee case were acquired by the United States through sales for direct taxes levied by act of Congress and not expressly ceded by the States, was held immaterial.

In *Wisconsin C. R. Co. v. Price County* <sup>32</sup> the doctrine of *Van Brocklin*

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<sup>29</sup> 147 U. S. 396.

<sup>30</sup> 16 Pet. 435.

<sup>31</sup> 117 U. S. 151.

<sup>32</sup> 133 U. S. 496.

v. Tennessee reappeared and was broadened so as to include taxation not only by the State but by any of its administrative subdivisions.<sup>33</sup>

### § 89. State Taxation of Federal Securities.

United States securities, it has been held, may not be taxed by the States for the reason that to admit this power would give to the State the authority to impair the borrowing power of the National Government. This was early decided in *Weston v. Charleston*.<sup>34</sup> "The tax on government stock," said Marshall, who rendered the opinion in the case, "is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

Distinguishing such a State tax from one on land after it has been sold by the Federal Government—a tax which it was conceded the States might lay—Marshall said: "The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, and it is no impediment to the power of borrowing that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold."

In *Banks v. The Mayor* <sup>35</sup> the attempt to make a distinction between the bonds of the Government issued for loans of money and certificates of indebtedness given in payment for supplies purchased, and to hold the latter subject to taxation by the States, was defeated by the court. So also in *Bank v. Supervisors* <sup>36</sup> United States notes issued under the acts of 1862 and 1863 were held exempt from State taxation.

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<sup>33</sup> "It is familiar law that a State has no power to tax property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for more local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency."

As to the inability of the States to tax lands allotted in severalty to the Indians under the act of 1881, the improvements on them and the cattle or other property furnished the allottees, see Section 228 of this work, and especially the case of *U. S. v. Reckert* (188 U. S. 432).

<sup>34</sup> 2 Pet. 449.

<sup>35</sup> 7 Wall. 16.

<sup>36</sup> 7 Wall. 26.



In *Bank of Commerce v. Commissioners*<sup>37</sup> stock of the United States constituting a part or the whole of the capital stock of a State bank was held not subject to State taxation, the fact that the tax was on the aggregate of the taxpayer's property and not upon the stock by name being held immaterial. So also in the *Bank Tax* case<sup>38</sup> a State tax on a valuation equal to the amount of the capital stock paid in, and surplus, of a State bank was held to be a tax on the property of the institution and, therefore, invalid, in so far as that property consisted of stocks of the United States.

In *Home Savings Bank v. Des Moines*<sup>39</sup> it was held that a State statute directing that shares of stock of State banks should be assessed to such banks, and not to individual shareholders, operated as a tax on the property of the bank and, therefore, in so far as such property represented Federal securities, violated the immunity of such securities from State taxation.<sup>40</sup>

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<sup>37</sup> 2 Black, 620.

<sup>38</sup> 2 Wall. 200.

<sup>39</sup> 205 U. S. 503.

<sup>40</sup> In its opinion the court said: "We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself. The result of this inquiry is of vital importance, because there may be a tax upon the shares of a corporation, which are property distinct from that owned by the corporation, and with a different owner, without an allowance of the exemption due to the property of the corporation itself, while, if the tax is upon the corporation's property, all exemptions due it must be allowed."

After reviewing *Bank of Commerce v. Commissioners* (2 Black, 620) and *Bank Tax* case (2 Wall. 200) the opinion continued: "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings; and, in the case at bar, on the shares of the stock, taking into account the capital, surplus, and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except by the manner by which they all sought the same end,—the taxation of the property of the bank. The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that, in effect, it is the property which is taxed. If, included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

Of the line of cases affirming the doctrine of *Van Allen v. Assessors* (3 Wall. 573) the opinion declared: "There is nothing in them which justifies the tax under consideration here, levied, as has been shown, on the corporate property. Without further review of the authorities it is safe to say that the distinction established in the *Van Allen* case has always been observed by this court, and that, although taxes by States have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities. On the other hand, whenever, as in these cases, the tax has been upon the property of the corporation so far as that property has consisted of such securities, it has been held void. . . . It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect

In *Farmers and Mechanics Savings Bank v. Minnesota* <sup>41</sup> it was held that a State might not tax, as property in the hands of their holders, bonds issued by municipalities in the Indian Territory and the Territory of Oklahoma. The court said: "The government of the respective Territories in question was that provided by the act of Congress of May 2, 1890. The territory of Oklahoma, therefore, was an instrumentality established by Congress for the government of the people within its borders, with authority to sub-delegate the governmental power to the several municipal corporations therein. These corporations were established for public and governmental purposes only, and exercised their powers and performed their functions as agents of the central authority. With respect to Indian territory, the situation under the act of 1890 was somewhat different, and the municipal corporations derived their authority directly from the act of Congress. . . . In our opinion, therefore, the municipalities of the territory of Oklahoma and of Indian territory were instrumentalities and agencies of the Federal government, with whose operations the States were not permitted to interfere by taxation or otherwise; and the issuing of municipal bonds was the performance of a governmental function, within the established doctrine. And we deem it immaterial that these bonds were not guaranteed by the United States, or even (in the case of the Oklahoma bonds) by the central government of the territory."

#### § 90. State Taxation of State Franchises.

Where, however, the State tax may properly be held to be a franchise tax upon the State institution, it has been held valid notwithstanding the fact that United States stocks constitute a part of the assets of the institution. "Nothing is more certain in legal discussion," the court said in *Society for Savings v. Coite*, <sup>42</sup> "that the privileges and franchises of a private corporation, all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government. Authority to that effect resides in the State wholly independent of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities." <sup>43</sup> So also in *Home Insurance Co. v. New York* <sup>44</sup> it was held that

of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro Nat. Bank v. Owensboro*."

<sup>41</sup> 232 U. S. 516.

<sup>42</sup> 6 Wall. 611.

<sup>43</sup> Citing *Osborn v. Bank of U. S.* (9 Wh. 738).

<sup>44</sup> 134 U. S. 594.

a State statute imposing a tax upon the "corporate franchise or business" of a company, and making reference to its capital stock and dividends only for the purpose of determining the amount of the tax, was not invalid as levying a tax on the capital stock or property of the company, but upon its corporate franchise, and, therefore, not subject to the objection that it imposed a tax on United States securities constituting a portion of the investments of the company. A tax levied upon shares of stock in the hands of their holders it has been uniformly held is not equivalent to a tax upon property of the company, or upon its corporate franchise, and, therefore, it has been consistently held that the States may tax the shares of a National bank in the hands of the shareholders, or, similarly, the stock of corporations whose investments consist wholly or in part of Federal securities.<sup>45</sup>

**§ 91. Income from Federal Securities Exempt from State Taxation.**

Incomes derived from interest on Federal securities, are exempt from State taxation.<sup>46</sup> This was held with reference to the exemption from Federal taxation of incomes derived from State securities, and the same reasoning would of course exclude from State taxation incomes derived from Federal securities.<sup>47</sup>

**§ 92. State Taxation of Circulating Notes of National Banks.**

Congress, by an act approved August 13, 1894, has provided that "circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating or intended to circulate, as currency . . . shall be subject to [State] taxation as money on hand or on deposit." In *Hibernia Savings and Loan Society v. San Francisco* <sup>48</sup> the Supreme Court held that notwithstanding the act of Congress of 1862 <sup>49</sup> declaring that "all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority," certain United States treasury checks for interest accrued upon registered bonds of the United States, where intended for immediate payment of interest, might be taxed by a State in the hands of the owner. "Had the government [of the United States]," said the court, "in the absence of money for the immediate payment of interest upon its bonds, issued new obligations for the payment of this interest at a future

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<sup>45</sup> *Van Allen v. Assessors* (3 Wall. 573); *Provident Institution v. Massachusetts* (6 Wall. 611); *Palmer v. McMahon* (133 U. S. 660).

<sup>46</sup> *Bank of Kentucky v. Com.* (4 Bush, 48).

<sup>47</sup> *Pollock v. Farmers' Loan and Trust Co.* (157 U. S. 429).

<sup>48</sup> 200 U. S. 310.

<sup>49</sup> Rev. Stat., Sec. 3701.

day, it might well be claimed that these were not taxable, as the taxation of such notes would, to the extent of the tax, impair their value and negotiability in the hands of the holder. . . . But where the checks are issued payable immediately, they merely stand in the place of coin, which may be immediately drawn thereon. . . . While the checks are obligations of the United States, and within the letter of Sec. 3701, they are not within its spirit, and are proper subjects of taxation."

### § 93. State Inheritance Taxes.

Bequests to the United States may be subjected to State inheritance taxes, such taxes, the courts, both State and Federal, holding to be not upon the property bequeathed, but upon its transmission by will or by descent. "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the State legislature assents to a bequest of it."<sup>50</sup>

Further, in *Plumber v. Coler*<sup>51</sup> it was held that the State inheritance tax might be collected upon a bequest consisting of United States bonds issued under an act of Congress specifically declaring them to be exempt from State taxation in any form. After an exhaustive review of authorities the court said: "We think the conclusion fairly to be drawn from the Federal cases is that the right to take property by will or by descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed." In *Murdock v. Ward*<sup>52</sup> it was held that a similar bequest of Federal securities was not exempt from the inheritance tax imposed by the War Revenue Act of Congress of 1898.

### § 94. State Taxation of National Banks.

By act of June 3, 1864, certain powers of taxation with reference to National banks were given by Congress to the States. This permission now included within Section 5219 of the Revised Statutes is as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State in

<sup>50</sup> *United States v. Perkins* (163 U. S. 625).

<sup>51</sup> 178 U. S. 115.

<sup>52</sup> 178 U. S. 139. For an acute discussion of the distinction between the power of the States in the exercise of their taxing powers, supplemented by their authority to control the transmission or receipt of property in cases of death, and the Federal taxing power not thus supplemented, see the dissenting opinion of Justice White in *Snyder v. Bettman* (190 U. S. 243).

which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares of national banking associations located within the State, subject to only the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital<sup>53</sup> in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

As has been already pointed out this permission measures the entire extent of the State's power of taxation with reference to the National banks. This Federal act has been construed to operate not as a grant by the United States to the States of a power not previously possessed, but as the removal by Congress of a hindrance to the exercise by the States of a power inherent in them. In *Van Allen v. Assessors*<sup>54</sup> the court said: "It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution and, consequently, that it cannot confer upon the State the sovereign right of taxation; nor is the State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. . . . The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government."

In *Van Allen v. Assessors*,<sup>55</sup> as previously stated, the court held that the congressional permission to the States to tax the shares of National banks in the hands of the shareholders was not defeated by the fact that such banks have their capital wholly or in part invested in Federal securities.

The power of the States under Section 5219 to tax property and the shares of stock of National banks of their holders, does not carry with it the authority to levy a tax that will in any wise operate as a tax on the franchise of the banks, that is, their right to be and to do business within the State.

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<sup>53</sup> As to the meaning that has been given by the courts and State legislatures to the phrase "other moneyed capital," see the article by George Bryan in the *Yale Law Journal* for December, 1914.

<sup>54</sup> 3 Wall. 573.

<sup>55</sup> 3 Wall. 573.

In *Owensboro National Bank v. Owensboro*<sup>56</sup> the only question held by the court to be open to argument was as to whether in fact the State tax involved operated as a tax on the franchise of the bank. That it would be void if it did so operate the court held not open to doubt. In this case, the tax, while not a tax on the franchise in a technical sense, was held to be not upon the shares of stock in the names of the shareholders, but upon all the intangible property of the bank, and, therefore, void.<sup>57</sup>

It has been shown that Section 5219 of the Revised Statutes gave to the States no option as to the mode in which National banks might be taxed. Except for real estate, the States were restricted to an ad valorem tax on the shares of the banks in the hands of the shareholders. In *Merchants' National Bank of Richmond v. City of Richmond*,<sup>58</sup> known as the "Richmond Case," it was held that a State tax upon bank stock at a higher rate than upon intangible personal property in general, was in violation of Section 5219. This decision led to a movement which resulted in the act of March 4, 1923,<sup>59</sup> which widened the permission given to the States with reference to the taxation of National banks, so that the States might either include the dividends of National banks in the taxable income of shareholders where an individual income tax system was in force; or assess the income tax directly against the banks, provided there was no discrimination against them as to rates; or impose an ad valorem tax on the shares of the banks as provided for in the original Section 5219. The act of 1923 somewhat amplified the limitation of the section that "Taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens," so as to make it read: "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of National banks: provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

By the act of March 25, 1926,<sup>60</sup> the right of the States to tax National banks was still further liberalized by the added option given to the States to impose franchise or other excise taxes measured by "the entire net income received from all sources." This last act also provided that if a State chose to levy a tax on the income as measured by the income of

<sup>56</sup> 173 U. S. 664.

<sup>57</sup> See generally as to State taxation of National Banks the article by Albert S. Bowles, "Some Aspects of National Bank Taxation" in 48 *University of Pennsylvania Law Review*, n. s. 505.

<sup>58</sup> 256 U. S. 635.

<sup>59</sup> 42 Stat. at L. 1499.

<sup>60</sup> 44 Stat. at L. 223.

banks, it might also tax individuals, under an individual tax law, upon dividends received by them from national bank shares.<sup>61</sup>

In the opinion in *First National Bank v. Anderson*,<sup>62</sup> decided in 1926, will be found an excellent and recent summary of the doctrines declared by the Supreme Court with regard to the status of National banks as Fed-

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<sup>61</sup> Section 5219 now reads: "SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however*, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value; as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section."

<sup>62</sup> 269 U. S. 341.



eral agencies, and of the constitutional and statutory rights of the States to tax them or their shareholders.

### § 95. State Taxation of Indian Lands.

In a considerable number of cases the Supreme Court has held immune from State taxation the lands of Indians even after they are held in severality by them, but with restricted powers of alienation. Among recent cases to this effect are *Childers v. Beaver*,<sup>63</sup> *Jaybird Mining Co. v. Weir*,<sup>64</sup> and *Shaw v. Gibson-Zahniser Oil Corp.*<sup>65</sup>

In the first of these cases it was held that the direction of Congress that the lands during the restrictive period should descend according to the laws of the States in which they might be situated did not operate to put them under the laws of such States with regard to inheritance taxes. The court, in the course of its opinion, said: "It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the Federal Government."<sup>66</sup>

In the *Jaybird Mining Co.* case it was held that ore in possession of a lessee which was taken from restricted Indian lands was not subject to State taxation. In *Shaw v. Gibson-Zahniser, Corp.*, however, it was held that lands, purchased for a full-blood Indian out of royalties on allotted lands, from one in whose hands the purchased land was subject to State taxation, continued thus subject, although not subject to alienation by the Indian without the consent of the Secretary of the Interior.

### § 96. Public Lands of the United States.

The constitutional power of the United States to acquire lands for its own uses by exercise of the right of eminent domain, and of the political authority exercisable over such acquired lands is elsewhere considered in this treatise.<sup>67</sup>

The public lands into which the United States came into possession at the time of the adoption of the Constitution, and those later obtained by various annexations of territory by the United States, belong to the United States in a proprietary as well as a political sense. As Federal property, these are subject to the same control and regulation, with right of lease or alienation by the United States, as is exercisable by private owners of real estate. In addition, being Federal property, they are exempt from

<sup>63</sup> 270 U. S. 555.

<sup>64</sup> 271 U. S. 609.

<sup>65</sup> 276 U. S. 575.

<sup>66</sup> Citing a list of cases.

<sup>67</sup> See Chapter XXVII.



control by the States, whether through the exercise of their taxing or other powers.<sup>68</sup>

However, the fact that lands belong to the United States does not necessarily exempt such areas from the exercise over them of the political jurisdictions of the States in which they may be situated.

In *Utah Power and Light Co. v. United States*<sup>69</sup> the extent of the power of Congress to provide rules and regulations for the use of the public lands of the United States was carefully considered, and the general doctrine relating thereto summed up in the following words:

"The settled course of legislation, congressional and State, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with the full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them. Thus, while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them.<sup>70</sup> From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many ways the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over State enactments sustained.<sup>71</sup> And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and prescribe the conditions upon which

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<sup>68</sup> *Wisconsin Central R. Co. v. Price County* (133 U. S. 496); *Pullard v. Hagen* (3 How. 224); *McGoon v. Scales* (9 Wall. 27); *United States v. Midwest Oil Co.* (236 U. S. 459). See especially this last case with reference to the power of the President by executive order without express congressional authorization, to withdraw public lands from entry or location.

<sup>69</sup> 243 U. S. 389.

<sup>70</sup> Citing *United States v. McBratney* (104 U. S. 621); *Van Brocklin v. Tennessee* (117 U. S. 151); *Wisconsin C. R. Co. v. Price County* (133 U. S. 496).

<sup>71</sup> Citing *Wilcox v. Jackson* (13 Pet. 498); *Jourdan v. Barrett* (4 How. 169); *Gibson v. Chouteau* (13 Wall. 92); *Camfield v. United States* (167 U. S. 518); *Light v. United States* (220 U. S. 523).

others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power. . . . It results that State laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress." <sup>72</sup>

It would appear that the United States has power to restrict to a certain extent, alienation of public lands after they have been conveyed by the United States in fee simple. Thus, in *Ruddy v. Russi* <sup>73</sup> it was held not only that the exemption of homestead lands <sup>74</sup> from liability to the satisfaction of any debt contracted prior to the issuing of the patent, extended to debts incurred by a homesteader after obtaining the receiver's final receipt and certificate, but before the patent had actually been issued, but also that the lands might not be sold on execution to satisfy a judgment, obtained after the final patent had issued, upon debts incurred prior to that time, but after the receiver's final receipt and certificate had been obtained. The court said:

"And it is settled that Congress has plenary power to dispose of public lands. *United States v. Gratiot et al.*, 14 Pet. 526. They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness. . . . Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the Legislature owed to the public." <sup>75</sup>

#### § 97. Federal Taxation of State Agencies.

In general the doctrine is established that the Federal Government may not interfere with the State agencies in the exercise of their rights, just as the States are constitutionally incompetent to interfere with Federal agencies in the exercise of their rights or powers. There are, however, these differences between the two cases. In the first place, as has been already seen, when there is a direct and inescapable conflict between the two jurisdictions, the State authority must yield to the Federal authority.

<sup>72</sup> In this case it was held that persons could not obtain a right to use of public lands of the United States as sites for commercial enterprises except by congressional permission.

<sup>73</sup> 248 U. S. 104.

<sup>74</sup> By U. S. Rev. Stat., Sec. 2296.

<sup>75</sup> Justice Holmes dissented.

In the second place, the immunity of State agencies from Federal control, whether by way of taxation or otherwise, extends only to such agencies as are essentially governmental in character. These two qualifications upon the immunity of State agencies or State-created corporations from Federal interference will appear in the cases which will be reviewed in the immediately following paragraphs.

In *Lane County v. Oregon*<sup>76</sup> it was held that the Federal Government was without the power to compel the States to receive in payment of their taxes paper currency that had been declared legal tender by the Federal Government. In its opinion the court said: "The people of the United States constitute one nation, under one government, and this government within the scope of the powers with which it is invested, is supreme. On the other hand the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States. . . . Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of the government. . . . In respect, however, to property, business and persons, within their respective limits their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but, with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State Constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold or silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did not intend, by the general terms of the Currency Act, to restrain

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<sup>76</sup> 7 Wall. 71.

the exercise of this power in the manner shown by the Statutes of Oregon."

In the case of *Collector v. Day*<sup>77</sup> it held that the Federal Government could not levy an income tax upon the salaries of State officials. In that case the court said: "If the means and instrumentalities employed by that [the General] Government to carry into operation the powers granted to it, are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation,—as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

To the author of the present treatise this decision was not only an unfortunate one from a fiscal point of view, but, constitutionally, an unnecessary one. Throughout the opinion the argument is implicit that the powers of the National Government and those of the States are upon an equal constitutional plane, so that what can be argued as to the implied limitations upon the one can be argued as to the other; whereas, in fact, as has been earlier pointed out, this is not the fundamental constitutional premise upon which the distribution of powers between the Federal and State Governments is founded. Upon the contrary, since the beginning of the Government under the Constitution, and in a great variety of ways, in cases of conflicts of jurisdiction, the United States has been recognized to have a constitutional status superior to that of the States. Thus, instead of supporting the decision in *Collector v. Day*, as the majority of the court held, the case of *McCulloch v. Maryland*<sup>78</sup> was in opposition to it; namely, that the States must yield when a Federal right is interposed.<sup>79</sup>

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<sup>77</sup> 11 Wall. 113. This case is sometimes styled *Buffington v. Day*.

<sup>78</sup> 4 Wh. 316.

<sup>79</sup> Mr. Justice Bradley dissented in *Collector v. Day* but upon grounds somewhat dissimilar from those indicated in the text, but, none the less, to the author's mind, of a cogent character. He said: "It seems to me that the General Government has the same power of taxing the income of officers of the State Governments as it has of taxing that of its own officers. It is the common government of all alike, and every citizen is presumed to trust his own Government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State Government. I cannot accede to the doctrine that the General Government is to be regarded as in any

In *Metcalf v. Mitchell*<sup>80</sup> it was held that consulting engineers, advising States and their political subdivisions as to water and sewerage projects, were not "employees" of the States or of their subdivisions, whose earnings would be exempt from Federal taxation under the War Revenue Act of Congress of October 13, 1917. In the course of its opinion the court declared that just what instrumentalities of either a State or of the Federal Government may be taxed by the other cannot be stated in terms of universal application. As to the exemption of agencies through which essential governmental functions are directly exercised, there was no doubt, but that as to other agencies or persons there might be doubt. "It is apparent," said the court, "that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule.

. . . In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of Federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the States, and vice versa. Taxation by either the State or the Federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it."

In *Panhandle Oil Co. v. Mississippi*<sup>80a</sup> it was held that a State might not apply a tax, the amount of which was measured by the amount of gasoline sold, to a dealer in so far as he sold gasoline to the Federal Government for

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sense foreign or antagonistic to the State Governments, their officers or people; nor can I agree that a presumption can be admitted that the General Government will act in a manner hostile to the existence or functions of the State Governments, which are constituent parts of the system or body politic forming the basis on which the General Government is founded. The taxation by the State Government of the instruments employed by the General Government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation."

Mr. Justice Bradley then went on to point out, in a manner that has since proved prophetic, the possible unfortunate consequences that might follow from such a limitation upon the Federal taxing power as that recognized by the majority of the court.

<sup>80</sup> 269 U. S. 514.

<sup>80a</sup> Decided May 14, 1928.

the use of its Coast Guard Fleet or Veterans' Hospital. The court said: "The petitioner's right to make sales to the United States was not given by the State and does not depend on State laws; it results from the authority of the National Government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." <sup>80b</sup>

In *Long v. Rockwood* <sup>80c</sup> it was held that a State might not tax royalties for the use of patents issued by the United States. This case related to the inclusion of such royalties within incomes subject to the State's income tax law. The court said: "The power to exclude others granted by the United States to the patentee subserves a definite public purpose—to promote the progress of science and the useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And the settled doctrine is that such instrumentalities may not be taxed by the States." <sup>80d</sup>

#### § 98. Federal Taxation of Properties of the States.

The Supreme Court, having in *Collector v. Day*, denied to the Federal Government the constitutional right to tax the salaries of State officials, has felt constrained to apply the doctrine in all other cases in which it has been conceived that a direct burden will be laid upon the States, or a possible hindrance to the exercise of their constitutional powers involved. Thus, in *Mercantile National Bank v. New York* <sup>81</sup> the court held that the United States might not tax bonds issued by a State or, under its authority, by one of its municipal bodies, and held by private corporations. In *Ambrosini v. United States*, <sup>82</sup> it held that bonds given to secure the proper enforcement of State laws in respect to the sale of intoxicating liquors, might not be Federally taxed.

In *United States v. B. & O. Ry.* <sup>83</sup> it was held that the United States could not collect a tax on money due a municipality of one of the States, the court saying: "A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise

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<sup>80b</sup> Justices Holmes, Brandeis, Stone and McReynolds dissented.

<sup>80c</sup> Decided May 14, 1928.

<sup>80d</sup> Justices Holmes, Brandeis, Stone and Sutherland dissented.

Query, as to the application of the doctrine of this case to royalties received on publications copyrighted under United States law.

<sup>81</sup> 121 U. S. 138.

<sup>82</sup> 187 U. S. 1.

<sup>83</sup> 17 Wall. 322.

within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."<sup>84</sup>

#### § 99. Federal Taxation of State Documents, Agencies and Securities.

In a number of cases in the State courts, interesting points have been raised and decided with reference to the obligation imposed by Federal laws to affix stamps to certain documents. There is little doubt that the United States may in its own courts, or in other ways, refuse to recognize the validity of unstamped documents, but it would seem that it may not dictate to State agencies what instruments they shall accept as valid and enforceable. Though Congress may provide that certain instruments shall be stamped and that, if not so stamped, they shall not be received as evidence in Federal courts, the State cannot be compelled to exclude them as evidence in its courts upon that ground. It has also been held by State courts that the United States may not impose a stamp tax upon judicial processes of State courts, or forbid the recording of unstamped mortgages, or tax the official bonds of State officers.<sup>85</sup>

In *Thomas v. United States*,<sup>86</sup> a Federal tax on the transfer of shares of State-chartered corporations was upheld, as a tax upon business transacted in the exercise of privileges enjoyed under State laws with respect to corporations.

In *Nicol v. Ames*,<sup>87</sup> the court sustained a Federal tax upon the enjoyment of privileges enjoyed by State incorporated boards of trade.

In *Ex parte Rapier*,<sup>88</sup> it was held that the fact that a lottery company was chartered by a State did not prevent the Federal Government from excluding its tickets from the mails.

In *Pollock v. Farmers' Loan and Trust Company*,<sup>89</sup> the constitutional

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<sup>84</sup> In this case two justices dissented on the ground that, conceding that the instruments for conducting the public affairs of the municipality are entitled to the same exemption from Federal taxation as those of the State at large, it did not follow that property possessed and used merely in a commercial way for income or profits was thus exempt.

<sup>85</sup> *Jones v. Keep* (19 Wis. 376); *Fifield v. Close* (15 Mich. 505); *Tucker v. Potter* (35 Conn. 46); *Moore v. Quirk* (105 Mass. 49); *Sayles v. Davis* (22 Wis. 225); *Davis v. Richardson* (45 Miss. 503); *Garland v. Gaines* (73 Conn. 662); 52 L. R. A. 915. Cf. *Judson On Taxation*, Sec. 501.

<sup>86</sup> 192 U. S. 363.

<sup>87</sup> 73 U. S. 509.

<sup>88</sup> 143 U. S. 110.

<sup>89</sup> 157 U. S. 429; 158 U. S. 601.

impropriety of a Federal tax which was construed to be a direct tax upon income derived from bonds issued by the political subdivisions or agencies of the States was declared.<sup>90</sup> The majority opinion declared: "It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from State, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, . . . It is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution." <sup>91</sup>

However, in *Murdock v. Ward*,<sup>92</sup> it was held that a Federal inheritance tax might be imposed on legacies or shares consisting of bonds issued under a law providing that they should be exempt from taxation in any form, direct or indirect, Federal, or State. In effect, it was declared that the tax was on the right to inherit and not upon the property inherited.

In *Snyder v. Bettman*,<sup>93</sup> it was held further that a Federal inheritance tax might be levied upon bequests to a State or a municipal corporation thereof, the tax in question being held to be neither on the property inherited nor on the right to inherit as established by State law, but upon the transmission or receipt of the property bequeathed.<sup>94</sup>

In *Greiner v. Lewellyn*,<sup>95</sup> it was held that a Federal "estate" tax, imposed by the act of Congress of September 8, 1916, like the earlier legacy or succession tax, was a duty or excise and not a direct tax, and that State or municipal bonds held by a decedent might be included in the net value of the estate upon the transfer of which the estate tax was imposed. "The transfer upon death is taxable," said the court in unqualified terms, "whatsoever the character of the property transferred and to whomsoever the transfer is to be made."

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<sup>90</sup> Citing *Buffington v. Day* (11 Wall. 115); *United States v. B. & O. R. Co.* (17 Wall. 322); *Van Brocklin v. Anderson* (117 U. S. 151); *Mercantile National Bank v. New York* (121 U. S. 138).

<sup>91</sup> Four justices dissented in this case, but not to the doctrine of the majority as to the non-taxability of the income from municipal bonds.

Further questions as to the constitutionality of Federal inheritance taxes are discussed in the chapter dealing with the Taxing Power of Congresses.

<sup>92</sup> 178 U. S. 139.

<sup>93</sup> 190 U. S. 249.

<sup>94</sup> Reciprocally it was held in *Plummer v. Coler* (178 U. S. 115), that a State tax might be collected on legacies consisting of United States bonds,—that the tax was not upon the bonds themselves, but in regulation of the right of bequeathing property by will.

<sup>95</sup> 258 U. S. 384.



§ 100. Effect of Sixteenth Amendment on the Taxing Power of the Federal Government with Respect to State and Municipal Bonds, and Salaries of State Officials.

In 1913 was proclaimed the adoption of the Sixteenth Amendment to the Federal Constitution which provides that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Taken in their literal meaning, and without regard to the circumstances leading up to their adoption, it is clear that the words "from whatever source derived" would give to the Federal Government constitutional power to tax incomes derived from State and municipal bonds. It is known, however, that the purpose of this amendment was to overcome the ruling of the Supreme Court in *Pollock v. Farmers' Loan and Trust Co.*,<sup>96</sup> which was to the effect that such a tax was, constitutionally speaking, a direct tax, and, as such, would have to be apportioned among the States in proportion to their respective populations, as provided for in Article I, Section 9, Clause 4 of the Constitution. In fact, we find the Supreme Court indicating in a number of cases its opinion that the Amendment should be construed as having only this effect, namely, not to grant any new power of taxation to the Federal Government, but only to relieve it, as to income taxes, from the obligation of apportioning them among the States according to their respective populations.

Thus, in *Brushaber v. Union Pacific R. R. Co.*,<sup>97</sup> the court, after quoting the Amendment said: "It is clear on the face of this text that it [the amendment] does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the *Pollock* case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided; that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subjected to the regulation of apportionment."

*Dicta* similar to the above were made by the court in *Stanton v. Baltic*

<sup>96</sup> 157 U. S. 429.

<sup>97</sup> 240 U. S. 1.

Mining Co.,<sup>98</sup> *Eisner v. Macomber*,<sup>99</sup> and *Peck v. Lowe*.<sup>100</sup> In *Eisner v. Macomber* the question was as to the power of Congress to tax as income, without apportionment among the States, stock dividends received by corporate shareholders, Congress having, in the Revenue Act of 1916,<sup>101</sup> declared that a "stock dividend shall be considered income." The court held that stock dividends could not correctly be deemed income, and, therefore, that a tax levied upon them could not be brought within the scope of the Sixteenth Amendment. With reference to the interpretation to be given to that Amendment the court said: "The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. . . . As repeatedly held, this [Amendment] did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among States of taxes laid on income."

In none of the cases above referred to was there involved the application of the Federal tax law upon State or municipal bonds or the salaries of State officials. In *Evans v. Gore*,<sup>102</sup> however, these possible subjects of taxation were more nearly approached, there being involved the constitutional power of the Federal Government to tax the salaries of Federal judges. In support of this tax, it was argued that the effect of the words of the Amendment "from whatever source derived" was to repeal or do away with the provision of Article I, Section 1, of the Constitution that the Federal compensation of Federal judges "shall not be diminished during their continuance in office." The court held that the tax in question would operate as such a diminution, and that the constitutional prohibition as to this was not removed by the Amendment. After reviewing the circumstances leading up to the adoption of the Amendment, the court said: "Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to new or excepted subjects."<sup>103</sup>

<sup>98</sup> 240 U. S. 103.

<sup>99</sup> 252 U. S. 189.

<sup>100</sup> 247 U. S. 165.

<sup>101</sup> 39 Stat. at L. 757.

<sup>102</sup> 253 U. S. 245.

<sup>103</sup> Justice Holmes dissented upon the ground that the United States was not stopped by Article III, Section 1, from taxing the salaries of its own judicial officers, or, if it was, that that estoppel had been cured by the Sixteenth Amendment. "I do not see," he said, "how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived."

For an able, but, to the author, not convincing argument that, notwithstanding the authorities that have been cited, it is still possible for the court, when the matter is directly presented to it, to hold that, since the adoption of the Sixteenth Amendment, incomes derived from State and municipal bonds are no longer exempt from Federal taxation, see the article by Prof. E. S. Corwin issued as a Supplement to the *National Municipal Review*, for January, 1924 (Vol. XIII, No. I).

**§ 101. Federal Taxation of State-granted Franchises.**

In *Veazie Bank v. Fenno*,<sup>104</sup> it was held that the Federal Government in the exercise of its constitutional power to regulate the currency, might tax out of existence the issues of State banks, even though it was conceded that the States have the constitutional power to charter such banks and authorize them to issue notes that will circulate as money. It was argued, in behalf of the bank, that the Federal tax in question was, in effect, a tax on a franchise granted by the State, and, as such, unconstitutional. The court held that, in fact, the tax was not upon the franchise of the bank, but declared, *obiter*: "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

The distinction between a Federally incorporated company, such as a National Bank or an interstate transportation company, and a private corporation chartered by a State of the Union, as regards their taxation by the government which has not created them, would appear to be this: The Federal Government has the power to grant corporate charters only to organizations or institutions which are to act as agencies for the carrying out of Federal policies or for the execution of powers vested by the Constitution in the Federal Government. Such Federally chartered organizations are, therefore, necessarily governmental in character, and, therefore, exempt from control, by taxation or otherwise, by the States. In the case of corporations chartered by the States the situation is different. These corporations may or may not be governmental in character. If they are not, the fact that they obtain their corporate powers from the States is of no significance so far as their amenability to Federal taxation is concerned.

In *South Carolina v. United States*,<sup>105</sup> the question was as to the right of the Federal Government to levy internal revenue taxes upon intoxicating liquors sold under a State dispensary system established by the State of South Carolina.

By several statutes the State had assumed the direct control of the wholesale and retail sale of intoxicating liquors within its limits, had established dispensaries, and appointed dispensers therein. The dispensers received fixed salaries, and had therefore no pecuniary interest in the sales,

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<sup>104</sup> 8 Wall. 533.

<sup>105</sup> 199 U. S. 437.

the entire profits therefrom being appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the State treasury. In previous cases the Supreme Court of the United States had held that the regulation and control of the sale of intoxicating liquors, so far as interstate commerce was not interfered with, was within the legitimate police power of the States, and, indeed, by express congressional statute the States had been permitted to control the sale of imported liquors after their arrival within the States. The question thus was: had the Federal Government the constitutional power to exact taxes from officials appointed and paid by the State of South Carolina and performing functions which the State was constitutionally empowered to intrust to them? The Supreme Court held that, in this particular case, it had. With reference to the argument that was made by South Carolina that for Congress to tax the agents of the State charged with the duty of selling intoxicating liquors, was to interfere with the State's legitimate police power, the court said: "We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution, and within its territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of Government.'<sup>106</sup> That expresses the full limit of national control over the internal affairs of a State. The right of South Carolina to control the sale of liquor by the dispensary system has been sustained.<sup>107</sup> The profits from the business in the year 1906, as appears from the findings of fact, were over a half million dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue taxation. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down."

The Supreme Court was not content to rest its judgment upon a premised possibility of serious interference with the revenues of the National Government should the State be permitted, by assuming control of an enterprise, to withdraw it from Federal taxation. Two additional reasons were given why the tax in question should be held valid. In the first place the court noted the fact that the tax "is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom." It is thus, the court said, similar to a succession tax which has been construed to be a tax levied upon and deducted from property before the person to whom it is bequeathed obtains a title thereto. The second

<sup>106</sup> Art. IV, Sec. 4.

<sup>107</sup> *Vance v. Vandercook Co.* (170 U. S. 438).

and strongest additional reason given by the Supreme Court for holding constitutional the Federal income tax upon the South Carolina dispensaries was that it was not a tax upon the means or instrumentalities employed by the State in discharge of its ordinary functions of government. Upon this point the court adverted to the fact that in the cases in which a Federal tax upon State agencies had been held unconstitutional, it had been levied upon instrumentalities of government. After a review of the cases, the court said: "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."<sup>108</sup>

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<sup>108</sup> In support of this distinction between the ordinary functions of government, and the control of private enterprises by the State, the court referred to the well-established distinctions between the duties of a public character cast upon municipal corporations, and those which relate to what may be considered their private business, and the resulting different responsibilities in cases of negligence in respect to the discharge of those duties, respectively. (*Oliver v. Worcester*, 102 Mass. 489; *Lloyd v. New York*, 5 N. Y. 369; *Western Sav. Fund Society v. Philadelphia*, 31 Pa. 175.) In the last case it was held that a city supplying gas to the inhabitants acts as a private corporation, and is subject to the same liabilities and disabilities. In its opinion the Supreme Court declared: "Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." Concluding its opinion, the Supreme Court of the United States said: "Now, if it be well-established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation."

Three justices dissented from the judgment rendered in *South Carolina v. United*

In *Flint v. Stone Tracy Co.*<sup>109</sup> the right of the United States to levy an excise tax upon the carrying on or doing business by corporations deriving their franchises or charters from the States was again carefully considered, and the conclusion reached that such a Federal tax is constitutional. The court said: "We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of State-created franchises, are not beyond the taxing power of the United States."<sup>110</sup> Distinguishing this Federal right to tax State-granted corporate franchises from the lack of right to tax the purely governmental agencies of the States, the court referred to *South Carolina v. United States*,<sup>111</sup> and said: "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, can not be taxed by the Federal Government.

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States. After a review of authorities, which in their judgment did not warrant the position assumed by the majority in the case on trial, these justices said, in answer to the contention that if the instrumentalities of the State in the control of the liquor trade be declared exempt from Federal taxation, the way is opened to the States seriously to interfere with Federal revenues by extending their operations in other similar directions: "But these extreme illustrations amount simply to saying that it is possible for the imagination to foreshadow conditions which, did they arise, would impair the government created by the Constitution, and, because such conjectures may be indulged in, the limitations created by the Constitution for the purpose of preserving both the State and National governments are to be disregarded. In other words, that the government created by the Constitution must now be destroyed, because it is possible to suggest conditions which, if they arise, would, in future, produce a like result. But the weakness of the illustrations as applied to this case is apparent. They have no relation to this case, since it is not denied that, as to liquor, the State has absolute power, and may prohibit the sale of all liquor, and thus prevent the United States from deriving revenue from that source. Again, therefore, when the true relation of the argument, to the case in hand is seen, it reduces itself to a complete contradiction, viz., a State may, by prohibition, prevent the United States from reaping revenue from the liquor traffic, but any other State regulation by which such result is accomplished may be prevented by the United States, because thereby the State has done indirectly only that which the State had the lawful power directly to do."

As to the point that the State of South Carolina was deriving a revenue from the conduct of the liquor business, the dissenting justices pointed to the fact that in previous cases it had been expressly settled that the law establishing the State dispensaries had not been passed as a revenue, but as a purely police measure.

<sup>109</sup> 220 U. S. 107.

<sup>110</sup> Citing *Michigan C. R. Co. v. Slack* (100 U. S. 595); *United States v. Erie R. Co.* (106 U. S. 327); *Spreckels Sugar Ref. Co. v. McClain* (192 U. S. 397). "It is true," said the court in the instant case, "that in the cases the question does not seem to have been directly made, but, in sustaining such taxation, the right of the Federal Government to reach such agencies was necessarily involved. The question was raised and decided in *Veazie Bank v. Fenno* (8 Wall. 533)."

<sup>111</sup> 199 U. S. 437.

But this limitation has never been extended to the exclusion of the activities of merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States." Continuing, the court said that it was no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. "These objects," said the court, "are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

"The true distinction is between the attempted taxation of those operations of the State essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation."

In application of the principle thus stated, the court declared that the so-called public service corporations represented in the instant cases were not exempt from the Federal tax.<sup>112</sup>

#### § 102. Federal Power of Eminent Domain in Its Relation to States' Rights.

The right of the Federal Government to use the power of eminent domain is not expressly given to it by the Constitution, but "it results from the powers that are given and, it is implied because of its necessity, or because it is appropriate in exercising those powers."<sup>113</sup> It does not need to be said that the States have the power of eminent domain in the exercise of which they are restrained only by the express or implied limitations of the Federal Constitution.

The relation of this power to the requirement of due process of law will

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<sup>112</sup> Citing *Union Pac. R. Co. v. Peniston* (18 Wall. 5).

<sup>113</sup> *United States v. Gettysburg Electric Co.* (160 U. S. 668). In this case the court upheld the right of Congress to provide for the taking of lands, with due compensation to their owners, for the purpose of preserving and marking with tablets, the battlefield of Gettysburg. "Any act of Congress," said the court, "which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane and intimately connected with and appropriate to the exercise of one or all of the powers granted by Congress must be valid. This proposed use comes within such description." See also *Kohl v. United States* (91 U. S. 367); *Monongahela Navigation Co. v. United States* (48 U. S. 312); and *Chappell v. United States* (160 U. S. 499).



be considered elsewhere in this treatise.<sup>114</sup> We shall be here concerned with it only in so far as, in its exercise, the rights of the States and of the United States come into apparent conflict.

That the United States does not require the consent of the States for the taking of property for its own public use is established, and, in fact, has never been seriously contested. In one of the first cases in which the Federal power of eminent domain was discussed,<sup>115</sup> we find the following language used by the court: "The consent of the State can never be a condition precedent of its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation after the land shall have been acquired."<sup>116</sup> Again in *Van Brocklin v. Tennessee*,<sup>117</sup> the court declared that the United States might exercise the power of eminent domain "with or without the concurrent act of the State in which the land is situated." In *Fort Leavenworth R. R. Co. v. Lowe*<sup>118</sup> the eminent domain power of the Federal Government was again carefully considered, and the following conclusions reached: "It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new Government would not be able to acquire lands within them, and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defense of the country or the discharge of other duties devolving upon it and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential under the Constitution to the transfer to the General Government, with the title, of political jurisdiction and dominion. Where lands are required without such consent the possession of the United States, unless political jurisdiction be ceded to them

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<sup>114</sup> See Chapter XCIX.

<sup>115</sup> *Kohl v. United States* (91 U. S. 367). See also *United States v. Fox* (94 U. S. 315).

<sup>116</sup> Art. I, Sec. 8: "The Congress shall have power . . . to exercise like [exclusive] authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

<sup>117</sup> 117 U. S. 151.

<sup>118</sup> 114 U. S. 525.



in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the Government, is subject to the legislative authority and control of the States equally with the property of private individuals. . . . Where therefore lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

As in the case of the States, the United States can grant to individuals or to corporations, whether chartered by itself or by the States, the right to exercise the right of eminent domain. Thus, in *Cherokee Nation v. Kansas City Ry. Co.*,<sup>119</sup> an act of Congress was sustained which gave to a State chartered corporation a right of way through the Indian Territory together with the authority to condemn lands of individual occupants. In *Luxton v. North River Bridge Co.*<sup>120</sup> the court unanimously upheld the right of Congress to give authority to the bridge company to condemn, for its purposes, lands within the States of New York and New Jersey.

That, in cases of conflict, the power of eminent domain of the States must yield to the constitutionally superior power of eminent domain of the United States is well settled. In *Cherokee Nation v. Southern Kansas R. Co.*<sup>121</sup> the court quoted with approval the following language of Mr. Justice Bradley in *Stockton v. Baltimore & N. Y. R. Co.*:<sup>122</sup> "The argument based upon the doctrine that the States have the eminent domain or highest domain in the lands comprised within their limits, and that the United States have no dominion in such lands, can not avail to frustrate the supremacy given by the Constitution to the Government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States Government should have an eminent domain still higher than that of the States in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessity or

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<sup>119</sup> 135 U. S. 641.

<sup>120</sup> 153 U. S. 525.

<sup>121</sup> 135 U. S. 641.

<sup>122</sup> 32 Fed. Rep. 9.

conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full power and complete power to execute and carry out its purposes."

A full application of this doctrine of Federal supremacy would seem to justify the taking by the United States for its own use of property belonging to the States. Thus it would appear from the language used in *St. Louis v. Western Union Tel. Co.*<sup>123</sup> that the court seemed to see nothing constitutionally improper in the United States taking for its own use lands owned by the States and devoted in proper form to their own public uses, provided due compensation were made.<sup>124</sup> The court said: "It would not be claimed . . . that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the Statehouse grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the Statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control is in the State, and is not within the competency of the National Government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State."

Even if it should be held, which is unlikely, that property owned and used by the States for their distinctively governmental purposes, is exempt from a taking by the Federal Government for its own uses, it is fairly certain that the courts will justify such a Federal taking of State property which is used for non-political or commercial purposes. In *South Carolina v. United States*,<sup>125</sup> as has been earlier pointed out, the court held that such State instrumentalities did not enjoy that exemption from Federal taxation which the governmental agencies of the State enjoyed. The same reasons there employed in support of that holding, are sufficient to maintain a similar distinction between the two kinds of agencies or properties with reference to the exercise by the Federal Government of the right of eminent domain.

That the States may not exercise their powers of eminent domain upon property of the United States, even if held only in a proprietary manner and not devoted to a specific public use, has recently been determined by the Supreme Court in *Utah Power and Light Co. v. United States*.<sup>126</sup> After referring to the fact that, from the earliest times, Congress had

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<sup>123</sup> 148 U. S. 92.

<sup>124</sup> In this case the court held that the act of Congress under which the company was claiming powers of eminent domain had not given the right to use the streets of a city for its poles, without the consent of the city or State.

<sup>125</sup> 199 U. S. 437.

<sup>126</sup> 243 U. S. 389.

determined the use that might be made of the lands of the United States, whether situated within the States or in the Territories, and that this legislation had been uniformly upheld, the court said: "It results that State laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."<sup>127</sup>

In *United States v. Chandler-Dunbar Water Power Co.*<sup>128</sup> it was held that the power of eminent domain had not been improperly exercised when, with reference to land which had been taken for the construction of works that would conserve the flow of a river and therefore promote its navigability, it was also provided that the excess of water power thus obtained might be leased to private parties. The court said: "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State Governments."<sup>129</sup>

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<sup>127</sup> In this case the Power Co. had claimed the right under the laws of the State in which it was situated to occupy and use certain lands belonging to the United States. The lower Federal court in this case had declared: "It is true that in some of the earlier decisions the validity of the exercise of the right of eminent domain by a State over the land of the United States has received apparent recognition [citing cases]. This view is predicated upon the assumption that while government lands are not reserved or held for specified national purposes, the United States occupies the position of a mere individual proprietor, with rights and remedies neither less nor greater. An examination of the cases cited, however, discloses that the peculiar facts with which they dealt, as well as the limitations stated in the opinions written, greatly modify the scope of the doctrine stated; and the later cases leave little doubt that the Supreme Court has not recognized, and will not recognize, the limited control of Congress over the territory and property belonging to the United States, for which defendant contends. The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the States to pay debts and provide for the common defence and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other States, or by treaty with a foreign country, whether the lands are located within States or in Territories, they are held for these supreme public uses when and as they may arise. The Congress has the exclusive right to control and dispose of them, and the State can interfere with this right or embarrass its exercise." *Cf. Corpus Juris*, Vol. XX, p. 619, note 50 (a).

<sup>128</sup> 229 U. S. 53.

<sup>129</sup> Citing and quoting from the opinion in *Kaukauna Water Power Co. v. Green Bay & M. Co.* (142 U. S. 254).

## CHAPTER VI

### THE MAINTENANCE OF FEDERAL SUPREMACY BY WRITS OF ERROR<sup>1</sup> FROM THE FEDERAL SUPREME COURT TO STATE COURTS

In a later chapter the organization and jurisdiction of the Federal courts will be considered. In the present and next succeeding chapters, the discussion of these courts and of their jurisdictional powers, will be limited to the matter of the maintenance of Federal supremacy over and against State authority. In the present chapter, the right of the Federal Supreme Court to review, upon appeal or writs of error, the decisions of State courts will be examined.

#### § 103. Twenty-fifth Section of the Judiciary Act.

A corollary that follows from the supremacy of Federal law is that when a Federal right, privilege or immunity is set up as a defense or authority for an act, opportunity shall exist for a final determination of this point in the Federal courts. Thus, the original Judiciary Act, passed in the first year of the Constitution, in its famous twenty-fifth section, provided that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision of the suit could be had, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." In order that this appellate jurisdiction might be effectual, this section also provided that instead of remanding the cause to the State court for a final decision therein, the Supreme Court might at its discretion, if the cause has been once before remanded, proceed to a final disposition of the same and award execution.

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<sup>1</sup> By act of January 31, 1928, Congress has substituted appeals for writs of errors. See § 796.

It will be observed that provision for writ of error from the Federal Supreme Court was made only for those cases in which the judgment in the State tribunals was adverse to the alleged Federal right, privilege or immunity. Where the State decision was favorable there was thought to be no need, based upon the principle of Federal supremacy, for a Federal review. In 1916, however, Congress provided that the Supreme Court should have the right to review decisions of State courts which are favorable to alleged Federal rights, privileges and immunities. The jurisdiction thus conferred will be later considered in the chapter dealing generally with the Federal Judiciary and Judicial Power.

**§ 104. Martin v. Hunter's Lessee.**

The constitutionality of this section of the Judiciary Act was affirmed by the Supreme Court in 1816 in *Martin v. Hunter's Lessee*.<sup>2</sup> This was a writ of error to the Court of Appeals of the State of Virginia, founded upon a refusal of that court to obey a mandate of the Federal Supreme Court. The State court, in its opinion had said: "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States. That the writ of error in this case was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court."

This position of the State court, the Federal court, in one of the weightiest of its decisions, declared to be erroneous, the argument being that, though not granted in express terms, the very nature of the Federal authority provided for by the Constitution makes this appellate power a necessary part of the general judicial power granted to the National Government.

**§ 105. Cohens v. Virginia.**

The appellate power of the Federal Supreme Court under the twenty-fifth section of the Judiciary Act was again contested in *Cohens v. Virginia*,<sup>3</sup> decided in 1821, Chief Justice Marshall rendering the opinion of the court. This was a criminal case and the first point made was that a case in which a State appeared as defendant in error was a suit against a State and as such forbidden by the Eleventh Amendment. The court held, however, that this Amendment has reference only to the suits in law or

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<sup>2</sup> 1 Wh. 304.

<sup>3</sup> 6 Wh. 264.

equity commenced or prosecuted against one of the United States by citizens of another State, and not to suits originally begun by a State. "It is, then, the opinion of the court," declared Marshall, "that the defendant who removes a judgment rendered against him by a State court into this court, for the purpose of re-examining the question whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the State."

Secondly, the State renewed its claim that in no case might the appellate jurisdiction of the Supreme Court be constitutionally exercised over the judgment of a State court. To this Marshall replied that the nature of the Federal Union provided by the Constitution and intended by its framers and adopters, required the exercise of the power. "We think," he declared, "that in a government acknowledgedly supreme, with respect to objects of vital interest to the Nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects."

To the contention made by the State that to grant the appellate jurisdiction in question would be to render possible a complete consolidation of Federal and State judicial power, Marshall replied: "A complete consolidation of the States so far as respects the judicial power would authorize the legislature to confer on the Federal courts appellate jurisdiction from the State courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few special cases, in the decision of which the Nation takes an interest, is too obvious not to be perceived by all."

Since *Cohens v. Virginia*, the constitutional power of the Federal Supreme Court to revise by writ of error decisions of State courts coming within the provisions of the twenty-fifth section of the Judiciary Act, cannot be said to have been open to constitutional doubt, notwithstanding the fact that its exercise gave rise to frequent protestations upon the part of those anxious to maintain the independence of the States from Federal control.<sup>4</sup>

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<sup>4</sup> See Charles Warren's *History of the Supreme Court*, and Beveridge's *Life of Marshall*.

## CHAPTER VII

### THE MAINTENANCE OF FEDERAL SUPREMACY BY THE REMOVAL OF SUITS FROM STATE TO FEDERAL COURTS

#### § 106. Right of Removal.

A corollary which necessarily follows from the doctrine of Federal supremacy is that no State can declare criminal and punish as such acts authorized by Federal law. Since the Civil War this has not been directly denied by the States, but it has been strenuously asserted by them that when an offence has been committed against their own peace, and the one committing it has been apprehended and brought to trial before their own courts, he is not entitled to have his case removed at once to the Federal courts simply by setting up as a defence that his act was done in pursuance of an authority delegated him by the General Government. The right to set up this defence has not been denied by the States, nor have they claimed that, should the decision of their courts be adverse to him upon this point, he may not take an appeal from their highest tribunals to the Supreme Court of the United States. But they have asserted that when an act has been committed which is criminal by their laws, it is, primarily, an offence against their peace, and as such cognizable only in their own courts, and, therefore, that though, as has been just said, a right of appeal from their highest courts to the United States Supreme Court upon the questions of Federal authority must be allowed, the trial of the offence may not, as a matter of right, be removed by the accused from the State court in which it is begun to one of the lower Federal courts.

These lower Federal courts possess only those powers which have been granted to them by act of Congress. By the original Judiciary Act <sup>1</sup> Congress did not, as it might have done, endow these tribunals with a general jurisdiction in proceedings against Federal officers based upon their official acts. By the famous Force Act of 1833, however, an act passed at the time of South Carolina's attempted nullification of the United States tariff law, it was provided that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, or on account of any act done under color of his office," the case, at the defendant's instance, might be at once removed from the State to the Federal courts for trial.

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<sup>1</sup> 1 Stat. at L. 73.



§ 107. *Tennessee v. Davis.*

This act has been from time to time amended, and is now included within Section 33 of the Judicial Code. Its constitutionality was first judicially examined by the Supreme Court in *Tennessee v. Davis*.<sup>2</sup> In this case Davis, a Federal revenue officer, killed a man, was arrested therefor, and, when brought to trial, applied for removal to a Federal court under this act. The State of Tennessee denied the constitutionality of this grant of right upon the ground that the act for which Davis was being tried was a violation of State and not of Federal law. This the Federal authorities admitted, but asserted that, inasmuch as the defendant was a Federal official, and claimed to have committed the homicide while in pursuance of his duties as such, the Federal courts had the right to assume jurisdiction of the case in order that the independence and supremacy of Federal authority might be maintained.

Justice Strong, in rendering the opinion of the United States Supreme Court upon this point, prefaced his discussion by saying: "A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government's preserving its own existence. As was said in *Martin v. Hunter's Lessee*,<sup>3</sup> 'the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can only act through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the State courts—the operations of the General Government may at any time be arrested at the will of one of its members. The legislature of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to the laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally the Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal authority arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its authority extends, it is

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<sup>2</sup> 100 U. S. 257.

<sup>3</sup> 1 Wh. 304.



supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. . . . The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. . . . If there is power in Congress to direct removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen under it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the National Government superior jurisdiction over cases involving authority and rights under the laws of the United States, are equally applicable to both. . . . Such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to an uniform and consistent administration of national laws. . . . It is true, the [Judiciary] Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal courts all the judicial power vested in the government. Additional grants have been made from time to time." <sup>4</sup>

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<sup>4</sup> As to the point raised by the State that the act of 1833 provided no specific mode of procedure, Justice Strong said: "The Circuit Courts of the United States have all the appliances that are needed for the trial of any criminal cases. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution had made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the General Government, grows entirely out of the division of powers between that Government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood, and it is time that it should be, it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts, according to its own form of proceeding."

In this case Justices Clifford and Field dissented, their dissent being based upon the argument that, granting (which they did not grant), that Congress may pass such laws as it deems necessary for the protection of its agents, and may for that purpose define the acts that shall be considered crimes, and give to the inferior Federal courts jurisdiction to try those charged with committing them, it had not in fact done so. The act of 1833 had, indeed, provided for the removal from State to Federal courts of criminal suits against officers acting under authority of any Federal revenue law growing out of

It is seen that Section 33 of the Judicial Code gives the power of removal only with reference to suits against revenue officers of the Federal Government. Section 31, however, provides that "when any civil suit or criminal prosecution is commenced in any State Court for any cause whatsoever against any person who is denied or cannot enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the

acts committed by them under such authority, but, said the dissentient Justices, there were upon the Federal statute books no laws specifically defining as a crime the act with which Davis was charged and affixing an appropriate penalty therefor. Therefore, they held, no Federal law having been violated, the Federal Circuit Court could not take or be given jurisdiction of the case. "Criminal jurisdiction is not by the Constitution conferred upon any court," they declared, "and it is settled law that Congress must in all cases, make any act criminal and define the offense before either the District or Circuit Courts can take cognizance of an individual charging the act as an offense against the authority of the United States. . . . Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offense, or declare it punishable as such, until it has been defined as an offense by an Act of Congress passed in pursuance of the Constitution." But, continued the justices, not only has Congress not legislated so as to give the necessary jurisdiction in the case in question, but it could not constitutionally do so. "Acts of Congress," they said, "cannot properly supersede the police powers of the State. . . . If the police law of the States does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the State and its exercise for the regulation of the actions of the citizens can never constitute an invasion of the national sovereignty or afford a basis for an appeal to the protection of the national authorities. In other words no case either in law or equity, under the Federal Constitution or laws or treaties of the United States, over which the Federal judicial power is constitutionally extended (Art. III, Sec. 2) thereby arises." "Offices may be created," they continued, "by a law of Congress, and officers to execute the same may be appointed in the manner specified in the Constitution; and it is not doubted that Congress may pass laws for their protection, and for that purpose may define the offense of killing such an officer when in discharge of his duties. . . . But the principal question in this case is of a very different character, as the indictment is against the officer of the revenue for murdering a citizen of the State having in no way any official connection with the collection of the public revenue. Neither the Constitution nor the Acts of Congress give a revenue officer or any other officer of the United States an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender."

This argument of the minority as to the constitutional incapacity of Congress to provide for the summary removal from the State to Federal courts of cases of the class of the one at issue overlooks, or at least puts aside as not controlling, the possibility, should its view be accepted, of a State, should it so desire, so administering its criminal law as seriously and even vitally to interfere with the exercise by the Federal Government of its acknowledged constitutional powers. Thus, as the majority pointed out, the State could do by so delaying the trial in its own courts of Federal officials charged with crime, as to render in large measure nugatory the right of the accused to appeal to the United States Supreme Court from the highest State court.

The majority doctrine in the Davis case has never been overruled.

jurisdiction of the United States or against any officer, civil or military, or other person for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of, or under color of, authority derived from any law providing for equal rights, as aforesaid, or refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant filed in said State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending." The constitutionality of this section has been affirmed.<sup>5</sup> As to all Federal officials other than revenue officers, Federal protection against State action, when necessary, must be sought in cases not covered by Section 641, either by way of writ of error from the highest State court to the Supreme Court of the United States, or, if that be inadequate, by writ of habeas corpus.<sup>6</sup>

**§ 108. Right of Removal in Civil Cases.**

The right to remove civil cases begun in State courts into the Federal courts will receive treatment in a later chapter.<sup>7</sup> In these cases the right is given not so much that Federal supremacy may be maintained as that impartial tribunals may be secured to the litigants.

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<sup>5</sup> *Strauder v. West Virginia* (100 U. S. 303).

<sup>6</sup> Chapter LXXI.

<sup>7</sup> Chapter LXXI.

## CHAPTER VIII

### MAINTENANCE OF FEDERAL SUPREMACY BY HABEAS CORPUS TO STATE AUTHORITIES

#### § 109. State Courts May Not Interfere with Federal Authorities.

During the *ante bellum* period the Federal Government often made use of State tribunals and officers for the execution of its laws. Thus State justices of the peace acted as examining magistrates in criminal cases for the Federal courts, State judges officiated in the execution of extradition treaties with foreign countries, aliens were naturalized in State courts, and State jails and penitentiaries were used for the incarceration of Federal criminals. Both because of this admixture of Federal and State judicial agencies, and because the principle of the absolute independence of the Federal Government from State control was not clearly recognized and admitted, the State courts early assumed the right, by the issuance of writs of habeas corpus, to determine whether a fugitive from justice of a foreign country and fugitive slaves should be surrendered; whether persons in the Federal army were properly held to military service; and even whether persons in the military service of a foreign State should be tried for acts done as belligerents and under the authority of their sovereigns in conformity with the laws of nations.<sup>1</sup>

It was not until 1859 that it was authoritatively established by the United States Supreme Court in the case of *Ableman v. Booth*<sup>2</sup> that the State courts were without the constitutional power to interfere in any way with the processes of Federal courts, or, in fact, with any agencies of the National Government.<sup>3</sup> Notwithstanding this decision, however, a number of the State courts still claimed and exercised the right to discharge enlisted soldiers and sailors of the United States from the custody of their officers, and this practice was not stopped until 1872 when, in *Tarble's case*,<sup>4</sup> the Federal Supreme Court held this to be beyond their power. In the opinion which he rendered in this case, Justice Field, after pointing out the distinct and independent character of the government of the United States, said: "Such being the distinct and independent character of the two governments within their respective spheres of action,

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<sup>1</sup> *People v. McLeod* (1 Hill, 377). See especially the paper of Seymour D. Thompson before the American Bar Association at its annual meeting in 1884, entitled *Abuses of the Writ of Habeas Corpus*.

<sup>2</sup> 21 How. 506; 16 L. ed. 169.

<sup>3</sup> See Chap. V.

<sup>4</sup> *U. S. v. Tarble* (13 Wall. 397).

it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other. Now among the powers assigned to the National Government is the power to raise and support armies, and the power to provide for the government and regulation of the land and naval forces. . . . No interference with the execution of this power of the National Government in the formation, organization and government of the armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. . . . State judges and State courts, authorized by laws of their States to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused.”<sup>5</sup>

Here again, as in the Davis case, the point at issue narrowed itself down to the question whether or not State agencies should be recognized to have a power which might, should the States see fit, be so exercised as seriously to embarrass the National Government in the performance of its constitutional duties. The strict application of the doctrine of a divided sovereignty would have led in both cases to a constitutional *impasse*. But in these as in other cases the Federal Supreme Court compelled the States

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<sup>5</sup> Chief Justice Chase dissented in this case. In the course of his opinion he said: “I have no doubt of the right of a State to inquire into the jurisdiction of a Federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry. I have still less doubt, if possible, that a writ of habeas corpus may issue from a State court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. . . . To deny the right of State courts to issue the writ, or what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed or the people who adopted the Constitution. That instrument expressly declares that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.”

in the exercise of their powers to subordinate themselves to the requirements of national convenience and necessity.

This case settled once for all the principle that a sufficient return to a writ of habeas corpus issued by a State court is the statement that the party is in custody under claim or color of Federal authority derived from either a statute or judicial process.

#### § 110. Issuance of the Writ by the Federal Courts.

The power of the Federal courts to issue the writ is purely statutory. This results from the general principle that the courts of the United States have only such jurisdictional powers as are expressly granted to them by the Constitution or by Congress.

The 14th section of the original Judiciary Act of 1789 provided: "That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to persons in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In *Ex parte Bollman*,<sup>6</sup> it was held that the grant of power to issue the writ was an independent one, and not merely as ancillary to and as an aid to the exercise of jurisdiction otherwise obtained.

In *Whitney v. Dick*,<sup>7</sup> it was held that the silence of the act of March 3, 1891, creating the Circuit Courts of Appeal, on the subject of habeas corpus prevented those courts from issuing the writ except in aid of a jurisdiction already obtained.

It will be observed that the act of 1789 gave to the Federal courts authority to issue the writ only as to persons in jail under or by color of authority of the United States. No provision was made for the release by the Federal courts of persons in custody by order of the authorities of a State.

The "Force Act" of 1833 gave to the Federal courts the power to issue writs of habeas corpus "in all cases of a prisoner or prisoners in jail or confinement where he or they shall be committed or confined, on or by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

In 1842 this authority of the Federal courts was further broadened

<sup>6</sup> 4 Cr. 75.

<sup>7</sup> 202 U. S. 132.

by the provision that the writ might issue when a subject or citizen of a foreign State, domiciled therein, is in custody because of an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity or effect of which is dependent upon the law of nations.

This act of 1842 grew out of the McLeod case.<sup>8</sup> McLeod, a British subject, was arrested and indicted for murder in New York, alleged to have been committed by him while one of a force of British troops which, during the Canadian rebellion of 1837, made an attack upon the steamer "Caroline" while moored in New York waters. The British Government avowed itself responsible for the act, as a necessary act of war, the steamer being engaged in carrying munitions of war to the Canadian insurgent forces, and demanded of the United States Government McLeod's immediate release. This the Federal Government requested of the New York authorities, but was met with a refusal, and found itself unable to proceed further because of the lack of jurisdiction of the Federal courts to issue the necessary writ of habeas corpus.

In 1867 the jurisdiction of the Federal courts was still further widened by the provision that the writ might issue "in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States."<sup>9</sup>

It is to be observed that, by statute,<sup>9</sup> the constitutionality of which is established,<sup>10</sup> the Federal courts have been given authority, in order to protect Federal constitutional rights, to employ the writ of habeas

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<sup>8</sup> *People v. McLeod* (1 Hill, 377).

The present statutory authority for the issuance of the writ by the Federal courts is contained in the following section of the Revised Statutes:

"Section 751. The Supreme Court and the Circuit [now abolished] and District Courts shall have the power to issue writs of habeas corpus.

"Section 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"Section 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof: or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, in its custody for an act done or omitted under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

<sup>9</sup> Rev. Stat., Secs. 754-761.

<sup>10</sup> See statement of the court in *Frank v. Mangum* 237 U. S. 309 at p. 330.



corpus for more than a bare legal review such as was its province under the common-law practice and the Act of 31 Car. II, Chap. 2, and to permit, under it, a more searching review of the facts in which the applicant is, or may be put under his oath to set forth the truth of the facts regarding the causes of his detention, and a disposition of the party by the Federal courts "as law and justice require." Thus, in the cases in which the prisoner is in custody pursuant to a final judgment of a State court, the Federal court, upon habeas corpus, where denial of a Federal constitutional right is alleged, may make inquiry into the truth and substance of the causes of the petitioner's detention, even though, in order to do so, it is necessary to go behind and beyond the record of his conviction in order to determine whether the State court had jurisdiction to render judgment against him.<sup>11</sup>

Armed with the authority thus given, especially by the act of 1867, the Federal courts have repeatedly taken from the custody of the States persons charged therein with offences against State law. Even the lowest of the Federal courts have not hesitated to exercise the power as to persons held for trial before the highest courts of the States.

In the case of *Thomas v. Loney*<sup>12</sup> the Supreme Court sustained the action of the lower Federal court in releasing from custody by habeas corpus a prisoner who had been arrested by State authority for alleged perjury committed before a notary public of the State in the case of a contested election of a member of the House of Representatives of the United States. "The power of punishing a witness," said the Supreme Court, "for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the Nation that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the State courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of a State upon a charge of perjury preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice. A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the Nation or of the State) designated by Act of Congress for the purpose, is accountable for the

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<sup>11</sup> *Re Cuddy* (131 U. S. 280); *Re Mayfield* (141 U. S. 107); *Whitten v. Tomlinson* (160 U. S. 231); *Re Watts* (190 U. S. 1); *Frank v. Mangum* (237 U. S. 309).

<sup>12</sup> 134 U. S. 372.



truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public of the United States, and within the exclusive jurisdiction of the courts of the United States."

§ 111. The Neagle Case.

The leading case, however, and, in some respects, the most extreme, in upholding the power of the Federal courts in the matter of the issuance of writs of habeas corpus to State authorities is that of *Re Neagle*.<sup>13</sup> In that case it was held that, without express statutory authorization, the general authority of the President to see that the laws of the Union are faithfully executed empowered him to appoint a deputy marshal to protect a Federal judge whose life was threatened; and that upon such deputy being arrested and brought to trial in a State court upon the charge of murder for a homicide committed while acting within the line of the duty thus assigned him, he was entitled to release on habeas corpus issued by a Federal judge. In this case the objection was raised that inasmuch as there was no Federal statute expressly authorizing such protection as Neagle had been instructed to give, he could not be said, in the language of the act of 1867, to be "in custody for an act done or omitted in pursuance of a law of the United States." To this Justice Miller, who rendered the majority opinion of the Supreme Court, replied: "In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a 'law' within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . . We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected."<sup>14</sup>

<sup>13</sup> 135 U. S. 1.

<sup>14</sup> Chief Justice Fuller and Justice Lamar dissented from the judgment in the Neagle case upon the ground that the President had had no constitutional power, in the absence of congressional authority, to provide, through the Attorney General, a guard for Justice Field. Why, they asked, if the President had this power, had it been necessary to pass various habeas corpus acts? "Why could not President Jackson, in 1833, as the head of the Executive Department, invested with the power and charged with the duty to take care that the laws be faithfully executed and to defend the Constitution, have enforced the collection of the Federal revenues in the Port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of the State authority with the aid of the act of 1833? Why, in 1842, when the Third Habeas Corpus Act was passed, could not the President of the United

### § 112. Writ Issued Only when Imperative.

The Supreme Court of the United States, though uniformly affirming the doctrine that the Federal courts have power, by writ of habeas corpus, to inquire into the cause of the restraint of the liberty of any person by a State when the justification of Federal authorization or immunity is set up for the act complained of, has, however, repeatedly, and of recent years with increasing emphasis, laid down the doctrine that the Federal courts should not, except in cases of peculiar urgency, exercise that power, but should leave such persons to pursue their remedy by writ of error to the Federal Supreme Court, after the adjudication of their cases in the States' highest courts.

In *Ex parte Royall*,<sup>15</sup> decided in 1886, the Supreme Court of the United States, while upholding the constitutional power of Congress to grant to the Federal courts jurisdiction to issue writs of habeas corpus in all cases where persons, in alleged violation of the Constitution, are in custody of a State court, took pains to emphasize the fact that the jurisdiction is to be exercised at the discretion of the court, and, in the case at bar, sustained the refusal of the Circuit Court to issue the writ. "We are of opinion," said the court, "that while the Circuit Court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution it is not bound in every case to exercise such a power immediately upon application for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and the mode in which it will exercise the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to regard and protect rights secured by the Constitution."

From the quotations which have just been made it is apparent that in the issuance of the writ, a distinction is made between those cases in which its issuance is necessary to protect the General Government in

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States by virtue of the same self-existing powers of the Executive, together with those of the Judicial Department, have enforced the international obligations of the government without any such act of Congress?"

<sup>15</sup> 117 U. S. 241.

the execution of its functions, and those in which the question is merely one of the petitioner's right to liberty. In this latter class of cases, the court said: "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made." The Federal courts, the opinion went on to declare, are to assume that the State courts will neither do injustice nor disregard the settled principles of Federal constitutional law. If, however, they should do so, the petitioner still has the privilege of taking his case by writ of error from the highest State court to the Supreme Court of the United States.<sup>16</sup>

The act of 1867 provides that, upon return of the writ of habeas corpus, "the court or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."<sup>17</sup>

It would not appear to be certainly settled just what are the facts to be determined and just what action is to be taken by the Federal court in all cases where the party suing out the writ claims that the act charged against him in the State court was done under the authority of the United States or in pursuance of a process of its courts. When, by means of the writ, the Federal court has brought the accused under its control, is it its duty in all cases to determine whether the accused was an officer of the United States and further whether he had acted in good faith, and within the scope of his Federal authority, and therefore entitled to a discharge; and, if not, to impose such penalty as the law and facts require? Or, where the question is not as to the Federal authority which is set up, but as to whether in fact that authority was overstepped, and there is conflicting evidence as to this, is it the duty of the Federal court to remand the party to the State court for the determination of the question?

The opinions in the *Ableman* and *Tarble* cases, and the reasoning of the court in *Tennessee v. Davis*, seemed to indicate that the former action is the correct one, namely, that the Federal court should not remand the accused to the State court, but itself determine the fact whether he has acted in excess of his Federal authority. In *United States ex rel. Drury*

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<sup>16</sup> For later refusals of the Federal courts to issue the writ of habeas corpus to persons in the custody of State courts in alleged violation of the Constitution, see *Tinsley v. Anderson* (171 U. S. 101); and *United States ex rel. Drury v. Lewis* (200 U. S. 1). In the first of those cases the Supreme Court reversed the judgment of the lower court, and dismissed the writ of habeas corpus which it had issued, and remanded the accused to the custody of the State authorities. In *Ex parte Wood* (155 Fed. 190), decided in 1907, habeas corpus was granted by a Federal court for the release of one who was charged in a State court with a violation of a State law, the enforcement of which had previously been enjoined by a Federal court because unconstitutional.

<sup>17</sup> Rev. Stat., Sec. 761.

v. Lewis,<sup>18</sup> however, the court accepted the alternative doctrine, and remanded the accused for trial to the State court, the evidence being conflicting as to whether or not he had in fact exceeded his Federal authority.

The court, quoting from *Baker v. Grice*<sup>19</sup> said: "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State, and finally discharged therefrom, and thus a trial by the State courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued."<sup>20</sup> In the instant case, however, the court found that there were not present the exceptional circumstances justifying this Federal intervention, and that the evidence was conflicting as to whether the act charged was done in performance of a Federal authority. This being so, the court declared that it was the proper province of the State court and not of the Federal tribunal to determine this question.

The court in this case, in the position which it assumed, cited no prior cases exactly in point. It did indeed refer to earlier adjudications, but none of these had reference to instances in which persons in custody of State authorities had sought release upon the claim that the acts charged against them were done in the course of official duty. In each instance the petitioners based their claim to release upon the ground that the imprisonment by the State authorities was in violation of their individual rights under the Constitution, laws or treaties of the United States. In such cases there was of course no reason, based upon Federal governmental supremacy and efficiency, why the Federal courts should not, in their discretion, leave the petitioners to set up such defense as they might have in the State courts, and on writ of error therefrom to the Federal Supreme Court.<sup>21</sup>

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<sup>18</sup> 200 U. S. 1.

<sup>19</sup> 169 U. S. 284.

<sup>20</sup> Citing *Re Loney* (134 U. S. 372); *Re Neagle* (135 U. S. 1).

<sup>21</sup> The law regarding the jurisdiction of the State courts over Federal officers is discussed in a valuable article by Mr. James L. Bishop in the *Columbia Law Review* for May, 1909, entitled "The Jurisdiction of State and Federal Courts over Federal Officers." Mr. Bishop suggests that the maintenance of the freedom of Federal authority from State interference, and at the same time the preservation of the proper powers of the State courts could be secured by extending the right of removal of cases from the State to Federal courts, now given under Section 643 of the Revised Statutes to Federal revenue officers, to all officers acting under authority of the United States; and that the issuance of the writ of habeas corpus by Federal courts be limited so as to be merely ancillary to such right of removal.

Upon habeas corpus the Federal courts may release from State custody after as well as before conviction in a State court.<sup>22</sup>

Not infrequently the Supreme Court has issued to State authorities a rule to show cause why the writ of habeas corpus should not issue, instead of at once issuing the writ. Such a rule having been issued and return made, the court, in *Ex parte Yarborough*,<sup>23</sup> said: "As this return is precisely the same that the superintendent [of the State penitentiary] would make if the writ of habeas corpus had been served on him, the court here can determine the right of the prisoners to be released on this rule to show cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the superintendent; and such is the practice of this court."<sup>24</sup>

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<sup>22</sup> *Hunter v. Wood* (209 U. S. 205).

<sup>23</sup> 110 U. S. 651.

<sup>24</sup> Judge John C. Rose, commenting upon this practice, in his *Jurisdiction and Procedure of the Federal Courts* (2d ed., p. 389) says: "This method of procedure is obviously more convenient when, as often happens, the court is sitting at some considerable distance from the place at which the prisoner is confined. Moreover, when the petitioner is in the custody of State officials, it is more courteous to the State to lay such a rule than to issue the writ in the first instance."

## CHAPTER IX

### THE MAINTENANCE OF FEDERAL SUPREMACY; THE INDEPENDENCE OF FEDERAL COURTS FROM STATE INTERFERENCE

#### § 113. Independence of Federal Authorities.

A Federal court having assumed jurisdiction over a person or piece of property, the State authorities are excluded from any interference therewith or from in any way assuming jurisdiction in the premises. This principle was violated by the authorities of the State of Wisconsin in the case of *Ableman v. Booth*<sup>1</sup> in annulling the proceedings of a commissioner of the United States and discharging a prisoner who had been committed by the commissioner for an offence against a Federal law. The Supreme Court of the United States declared the impropriety of these actions in the following language: "The supremacy of the State courts over the courts of the United States, in cases coming under the Constitution and laws of the United States is now for the first time asserted and acted upon in the Supreme Court of a State." Protesting against this action, the opinion declared: ". . . We do not question the authority of a State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. But, after the return is made, and the State judge or court is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further."

That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned.<sup>2</sup>

The inability of the State courts by injunction or otherwise to control proceedings in Federal courts is declared in *Weber v. Lee Co.*,<sup>3</sup> *United States v. Keokuk*,<sup>4</sup> and *Supervisors v. Durant*.<sup>5</sup> This inability arises

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<sup>1</sup> 21 How. 506.

<sup>2</sup> *M'Clung v. Silliman* (6 Wh. 598); *Kendall v. U. S.* (12 Pet. 524); *U. S. v. Schurz* (102 U. S. 378).

<sup>3</sup> 6 Wall. 210; 18 L. ed. 781.

<sup>4</sup> 6 Wall. 514; 18 L. ed. 933.

<sup>5</sup> 9 Wall. 415; 19 L. ed. 732.

not so much from the supremacy of the Federal courts as because the State and Federal judicial systems are independent of one another. In *Weber v. Lee Co.* the court said: "State courts cannot enjoin the process of proceedings in the circuit [Federal] courts; not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action." The same reason is given in *United States v. Keokuk*.

#### § 114. Injunctions from Federal to State Courts.

It is, however, not quite correct to say that the two judicial systems are "entirely independent in their sphere of action." It is true that the State courts are wholly without power in any way to control the operations of the Federal courts, but the reverse is not true. As has already appeared, a writ of error lies in certain cases from the Federal Supreme Court to the State courts, and, when removal of a case is sought, the Federal courts may issue a writ of certiorari to the State court demanding a copy of the record, and the clerk of the State court refusing compliance with this demand becomes, under an act of Congress, liable to fine or imprisonment. Furthermore the Federal courts possess the right to protect their own jurisdictional rights or the rights of parties to suits before them by restraining orders forbidding proceedings in the State courts.

It is true that, actuated by a desire to preserve so far as possible the independence of the State judiciaries, Congress, by act of 1793, provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State."<sup>6</sup> However, since the decision of the court in *French v. Hay*,<sup>7</sup> in 1875, the Federal courts have not hesitated to enjoin parties from proceeding in State courts where it has been deemed necessary to preserve their own jurisdictional rights, or to protect individuals in the enjoyment of their Federal rights.<sup>8</sup>

Prior to 1875 when the same matter was sought to be litigated in both a State and a Federal court the uniform practice had been for the court which had first gained jurisdiction to exhibit this fact in the other court with the request that that court stay proceedings therein. In *French v. Hay* an injunction was issued for the purpose by the Federal court, and this procedure has been since repeatedly followed. In the cited case the court said: "The court [below] having jurisdiction *in personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have re-

<sup>6</sup> This section, as later amended so as to exclude from its operation proceedings in bankruptcy, now constitutes Section 720 of the Revised Statutes.

<sup>7</sup> 22 Wall. 250.

<sup>8</sup> It is to be observed that the injunction is not directed to the State courts, but to the parties restraining them from proceeding in the State courts.



quired to be done or omitted within the limits of such territory.<sup>9</sup> Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenced upon by any other tribunal. . . . The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of the provision."<sup>10</sup>

In *Simon v. Southern Railway Co.*<sup>11</sup> it was held that Section 720 of the Revised Statutes did not forbid the issuance of an injunction by a Federal court to prevent the enforcement by a judgment creditor of a judgment obtained in a State court by fraud and without notice to the judgment creditor, and therefore void. Admitting that an injunction might not have been permissible as to the case while pending in the State tribunal, the Supreme Court said: "But when the litigation has ended and a final judgment has been obtained, and when the plaintiff endeavors to use such judgment, a new state of facts, not within the language of the statute, may arise. In *Julian v. Central Trust Co.*,<sup>11a</sup> a judgment was obtained in a State court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it might have been perfectly valid in itself.

"Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid State judgment can be enjoined by the United States court from its inequitable use, by so much the more can the Federal courts enjoin him from using that which purports to be a judgment, but is, in fact, an absolute nullity."<sup>12</sup> The court then quoted with approval the following from its opinion rendered in *Marshall v. Holmes*:<sup>13</sup> "Authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit which is, none the less, an original,

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<sup>9</sup> Citing *Watts v. Waddle* (6 Pet. 391); *Lewis v. Darling* (16 How. 1).

<sup>10</sup> For a more recent case, see *Rickey Land & Cattle Co. v. Miller* (218 U. S. 258). As to the enjoining by the courts of one State of the Union of proceedings in the courts of other States, see note in 28 *Yale Law Journal*, 503.

<sup>11</sup> 236 U. S. 115.

<sup>11a</sup> 193 U. S. 112.

<sup>12</sup> Citing *Marshall v. Holmes* (141 U. S. 597); *Gaines v. Fuentes* (92 U. S. 10); and *Barrow v. Huntor* (99 U. S. 85).

<sup>13</sup> 141 U. S. 597.



independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the State court itself to set aside or vacate the judgment in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud." The court then added: "And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service."

In *Dietzsch v. Huidekoper*<sup>14</sup> it was held that the prohibition of Section 720 of the Revised Statutes would not prevent a Federal court from issuing an injunction restraining proceedings on a replevin bond, the State suit being based on a judgment obtained in a State court after the defendant had removed the case to the Federal courts and there obtained judgment in his own favor. The court said: "The action on the replevin bond in that [the State] court was simply an attempt to enforce the judgment of that court in the replevin suit, rendered after its removal to the United States Circuit Court, and after the State court had lost all jurisdiction over the case. If no judgment had been rendered in the State court against the plaintiffs in the replevin suit, no action could have been maintained upon the replevin bond. The bond took the place of property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. The suit upon the replevin bond was, therefore, but an attempt to enforce a pretended judgment of the State court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court, by a judgment in favor of the plaintiffs in replevin. The bill [for injunction] in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them. A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."<sup>15</sup>

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<sup>14</sup> 103 U. S. 494.

<sup>15</sup> In *Mississippi Railroad Commission v. Illinois Central R. Co.* (203 U. S. 335), it was held that the commission was not a court within the meaning of Rev. Stat., Sec. 720.

In *French v. Hay* (22 Wall. 250), the court said: "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching

In *Martin v. Hunter's Lessee*,<sup>16</sup> a case, it will be remembered, arising out of the refusal of the State court to obey a mandate from the Federal tribunal, the court did not find it necessary to decide whether or not the Federal court had the power to issue a mandate to the Virginia court to enforce its former judgment. Instead, the court simply reversed the judgment of the Virginia Court of Appeals, and affirmed that of the lower court. Justice Johnson rendered a concurring opinion in which he said: "The presiding judge of the State court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever its form) is, in substance, no more than a mode of compelling the opposite party to appear before this court and maintain the legality of his judgment obtained before the State tribunal. An exemplification of the record is the common property of every one who chooses to apply and pay for it, and thus the case and the party are brought before us."

After pointing out that the court disavowed all intention to decide as to the right to issue a compulsory process to the State courts, Justice Johnson, went on to argue that the Federal court might properly issue a mandamus only to the lower Federal courts, and that in case a State court, whose decrees might be reversed by the Federal court, should refuse to alter its action in obedience thereto, the Federal Supreme Court, under authority granted by the Judiciary Act, where the case had once before been remanded, could itself proceed to a final decision of the case and the awarding of a judgment thereupon.<sup>17</sup> By this means and by a liberal use of the writ of injunction and that of *habeas corpus ad subjiciendum*, Justice Johnson declared that the constitutional revising power might be fully secured to the United States without ever resorting to compulsory or restrictive processes upon the State tribunals.

#### § 115. Federal Injunctions to Restrain State Officials from Executing Unconstitutional Laws.

The circumstances under which the Federal courts will issue injunctions restraining State officials from enforcing, or bringing suits in the State

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proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision. If the State courts should persist in proceeding—a thing not to be expected—the wrong will be on the part of those tribunals and not of the court below."

<sup>16</sup> 1 Wh. 304.

<sup>17</sup> By Act of 1867 (Rev. Stat., Sec. 709), the Supreme Court was given this power without reference to whether or not the case had been previously remanded. That act provides, "the Supreme Court may, at their discretion, proceed to a final decision and award execution, or remand the case to the inferior court."

courts to enforce a State act which is alleged to be in contravention of the Federal Constitution will be further considered in Chapter LXXVII, in which the suability of the State is discussed.

**§ 116. Federal Mandamus to State Officials.**

The Federal courts may not constitutionally be given, the jurisdiction to issue writs of mandamus to compel the performance by State officials of State duties.<sup>18</sup> The constitutional power of Congress to authorize the Federal courts, by writs of mandamus, to compel the performance, whether by State or Federal officials, of acts required in order that Federal constitutional rights may be protected, would seem to be beyond question, though Congress has not yet seen fit to grant to these courts the power except as ancillary to jurisdiction already otherwise obtained.<sup>19</sup> It is to be remembered, however, that Congress cannot, without the consent of the State, impose upon its functionaries the performance of Federal duties. Where, however, the act ordered is one unconnected with his official State duties, the fact that an individual is a State functionary would not exempt him from the mandatory power of the Federal courts.

**116a. State Restrictions upon the Right of Removal of Suits from State to Federal Courts.**

By various acts of Congress the right has been granted to defendants to remove into Federal courts civil actions begun in State courts, where there is a diversity of citizenship of the parties. This right, which will be more fully discussed in another chapter,<sup>20</sup> is granted, not in order that Federal supremacy may be maintained, but in order that an impartial tribunal may be secured for the hearing of suits to which citizens of different States are parties. One important question, however, with regard to this right of removal does involve the matter of Federal supremacy, and needs, therefore, to be discussed at this point.

**§ 117. Power of the States to Prevent Foreign Corporations Invoking Federal Jurisdiction.**

Foreign corporations so far as they are engaged in interstate or foreign commerce have a Federal right to enter the States in order to carry on such commerce: and all corporations chartered by one State and doing business in other States, have the constitutional right, when sued by the corporations or citizens of those States, to have the suits removed into the Federal courts. These rights are elsewhere discussed in detail. The question here to be discussed is as to the constitutional right of the States, into

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<sup>18</sup> *Prigg v. Pennsylvania* (16 Pet. 539).

<sup>19</sup> *U. S. v. Circuit Court* (126 Fed. Rep. 169).

<sup>20</sup> Chapter LXXI.

which the corporations of other States desire to enter and carry on their business, to require, as a condition precedent to such entry or to a continuance of their business in the States after entry, that such corporations will agree not to exercise, or, in fact, will not exercise, their Federal right of removal. Here it is apparent that the question is not so much the right of a State to interfere with the exercise by a Federal court of its jurisdiction when obtained, as it is to prevent such jurisdiction from being invoked.

That the States cannot put restrictions upon the removal of cases from their courts to Federal tribunals any more than they can prevent it was declared in a case arising under a statute of the State of Wisconsin which provided that insurance companies of other States desiring to do business within its limits should sign a written agreement that they would not remove to the Federal courts suits brought against them in the State's courts. One of these companies, having removed a case to the Federal courts notwithstanding its agreement not to do so, the Wisconsin courts, ignoring the fact of its removal, proceeded with the case and rendered judgment against the company. The Supreme Court of the United States, upon appeal to it, declared the judgment void upon the ground that the agreement itself and the statute requiring it were illegal, as no one could be compelled to bind himself in advance not to exercise a right guaranteed to him by the Constitution any more than he could barter away his life or freedom.<sup>21</sup>

When, however, in a later case, the Supreme Court of the United States was asked to issue an injunction forbidding the Secretary of State of Wisconsin to revoke the license of an insurance company that had violated its agreement not to remove, the court held that it could not thus control the action of a State official, even though his action was apparently based upon an improper ground. The court said: "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute."<sup>22</sup> In other words it was held that inasmuch as the right both of granting and of revoking a license to a foreign corporation to do business within a State belonged to the proper officer of that State, it was not within the competence of a Federal court to determine whether that power was exercised for a good or bad reason.

But when, in a still later case, there was drawn into question the operation of a statute of Iowa which declared that upon the violation by a foreign insurance company of its agreement not to remove a case to the Federal courts, its license should *ipso facto* become void, the Federal Supreme Court held that the violation of an illegal agreement could not of

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<sup>21</sup> Home Insurance Co. v. Morse (20 Wall. 445; 22 L. ed. 365).

<sup>22</sup> Doyle v. Continental Insurance Co. (94 U. S. 535).

itself operate as a revocation of the company's license. If revoked at all it would have to be by the act of a competent State official, and not, *ipso facto*, by the exercise of a constitutional right.<sup>23</sup>

This entire subject was reviewed in *Security Mutual Life Insurance Co. v. Prewitt*<sup>24</sup> in which it was held that a State might by statute provide that if a foreign insurance company should remove to a Federal court a case which has been commenced in a State court, the license of such company to do business within the State should thereupon be revoked. In its opinion the court said: "It is admitted that a State has power to prevent a company from coming into its domain, and that it has the power to take away the right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the company denied [in this case] is the right of a State to enact in advance that if a company remove a case to a Federal court, its license shall be revoked. We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle* case we think is good."<sup>25</sup>

From the foregoing cases it is apparent that the theory was that there was no abandonment of the principle that the States are constitutionally incompetent to interfere with or prohibit the exercise of a Federal right. Corporations chartered in one State and doing business in another State it was argued may exercise the right of removal given them by the Federal statutes without reference to what the laws of the States in which they are doing business may provide, and this they may do even if they have contracted with those State authorities not to exercise these rights. The fact that the State authorities, in the exercise of a power acknowledged to be possessed by them, withdraw, or threaten to withdraw, a privilege which they have granted, furnishes no ground for Federal relief. In other words, the argument was that though there might be a causal nexus between the exercise of the Federal right of removal and of the State's withdrawal of its permission to the foreign corporation to do business within the State's limits, there was, legally speaking, no connection. Each was the exercise of an independent right. In short, the situation was

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<sup>23</sup> *Barron v. Burnside* (121 U. S. 186).

<sup>24</sup> 202 U. S. 246.

<sup>25</sup> A strong dissenting opinion, concurred in by Justice Harlan, was filed in this case by Justice Day.

not similar to one where the State interferes with or hinders the operation of a Federal agency, as, for example, by the taxation of its franchise. In the cases above considered, no attempt was made by the States to declare what cases should and what cases should not be removed into the Federal courts, or an effort made in any way to interfere with the exercise of their jurisdiction by those courts after the cases were removed into them. Whenever this has been attempted the Federal courts have prevented it. Thus they have repeatedly declared that the jurisdiction conferred upon the Federal court can not be in any way abridged or impaired by the statutes of a State.<sup>26</sup>

So, also, it is held that the proper petition and bond having been filed, a case is considered removed even though the State court may refuse to make an order of removal, and may in fact proceed with the trial of the cause.<sup>27</sup> In such cases the defendant may, if he choose, defend the case in the State court, and after final judgment obtain a writ of error from the United States Supreme Court, and in so doing he does not forfeit his right to defend in the lower Federal court. The Circuit Court can issue a writ of certiorari to the State court demanding a copy of the record in the case and the clerk refusing to furnish it becomes liable under a Federal act to fine or imprisonment.<sup>28</sup>

Such was the situation in which the matter was left by the Prewitt case. It soon developed, however, that the court was not satisfied with the conclusion it had arrived at, and, as a result, it first refused to apply its logic, and then finally abandoned it. In the case of *W. U. Telegraph Co.*

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<sup>26</sup> *Hyde v. Stone* (20 How. 170); *Smyth v. Ames* (169 U. S. 466); *Mercer Co. v. Cowles* (7 Wall. 118); *Lincoln Co. v. Luning* (133 U. S. 529); *Chicot Co. v. Sherwood* (148 U. S. 529); *Barrow S. S. Co. v. Kane* (170 U. S. 100).

<sup>27</sup> *Home L. Insurance Co. v. Dunn* (19 Wall. 214); *Marshall v. Holmes* (141 U. S. 589); and cases there cited.

<sup>28</sup> Act of March 3, 1875. Whether Congress has the power thus to punish the refusal of the State official to perform this duty has not received judicial determination. If, however, we judge by analogy from the decision in *Ex parte Siebold* (100 U. S. 371), and if the act required is a purely ministerial one, Congress has the power. In *Ex parte Virginia* (100 U. S. 339), a judge of a Virginia court had been indicted for a violation of the Federal Civil Rights Act of 1875 in that he had excluded negroes from grand and petit juries. The selection of jurors the majority of the court declared to be a purely ministerial act, and, as to the fact that the accused was a State official, said: "We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from obligation to obey the Constitution of the United States, or to take away the power of Congress to punish his disobedience." Justice Field, in a dissenting opinion concurred in by Justice Clifford, strongly urged that the act of 1875 was unconstitutional in so far as it attempted to govern the selection of jurors in State courts. He argued that the selection of jurors is a judicial and not a merely ministerial act (quoting *Kentucky v. Dennison*), and that Congress had no authority over judicial officers of the States in discharge of their duties under State laws. For a fuller discussion of this case see Chapter XIV.

v. Kansas <sup>29</sup> the court held unconstitutional as an interference with interstate commerce a State law exacting from a foreign telegraph corporation, as a condition of being permitted to continue to do a local business within the State, a charter fee of a given per cent of its entire authorized capital stock. The court declared: "The vital difference between the Prewitt case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce." This, the author submits, is true enough, but the essential fact still remained that the Prewitt case permitted the State to exact of the foreign corporation, as a condition to its being permitted to do business within the State, that it should forego the exercise of a Federal constitutional right, whereas, in the later case, it was held that the State might not, as a similar condition, interfere with the exercise by the foreign corporation of the Federal right of carrying on interstate commerce, which latter right can scarcely be said to be a more important one than that involved in the Prewitt case. It would seem, therefore, that the ground suggested by Justice White in his concurring opinion in the later case was a stronger one, namely, that the company having been permitted to enter the State and to construct its plant there, the onerous conditions attempted to be imposed by the State as a condition to its remaining there were confiscatory and, therefore, the law wanting in due process of law.

In *Herndon v. Chicago, R. I. & P. R. Co.*,<sup>30</sup> it was held, without extended argument, and upon the basis of prior decisions, that a license or permit granted by a State to a foreign railway company to come into the State could not be revoked under authority of State law, because the company had brought a suit in a Federal court or had removed into a Federal court a suit brought against it in a State court, after the company had entered the State in compliance with its laws and had acquired, with the sanction of the State, a large amount of property within its borders.

In *Harrison v. St. Louis & S. F. R. Co.*<sup>31</sup> it was held that the right of an interstate railway carrier, chartered in Missouri and doing business in Oklahoma was unconstitutionally abridged by a law of the latter State which provided that its license or charter to do business within its borders should be immediately revoked if it should assert in any court within the State a domicile within another State or foreign country, and which further provided for severe penalties for continuing to do business within the State after such revocation of its charter or license. After emphasizing the immunity of the Federal right, in cases provided for by Federal Statutes, to remove into Federal courts suits instituted in State courts, the Supreme Court said: "It follows that the States are, in the nature of things, with-

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<sup>29</sup> 216 U. S. 1.

<sup>30</sup> 218 U. S. 135.

<sup>31</sup> 232 U. S. 318.

out authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal." The proposition that the constitutionality of the State's action was supported by the decisions in *Doyle v. Continental Ins. Co.*<sup>32</sup> and *Security Mutual Life Ins. Co. v. Prewitt*,<sup>33</sup> was declared unfounded. "Those cases," said the court, "involved State legislation as to a subject over which there was complete State authority; that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State over the subject dealt with does not exist has since been so repeatedly passed upon as to cause the question not to be open. *Western U. Teleg. Co. v. Kansas* (216 U. S. 1, 54); *Pullman Co. v. Kansas* (216 U. S. 56); *International Textbook Co. v. Pigg*, (217 U. S. 91); *Buck Stove & Range Co. v. Vickers* (226 U. S. 205), and *Herndon v. Chicago, R. I. & P. R. Co.* (218 U. S. 135). The grounds of the decision in the last case show the extremely narrow scope of the rulings in the *Doyle* and *Prewitt* Cases, and render their inapplicability to this case certain. Indeed, the ruling in the *Herndon* Case and in those subsequent to the *Doyle* and *Prewitt* Cases, most of which were reviewed in the *Herndon* Case, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

In *Donald v. Philadelphia & R. Coal & I. Co.*<sup>34</sup> it was held that a State statute was unconstitutional which provided for the revocation of the license of a foreign corporation to do business within the State whenever it should remove or make application for removal to a Federal court of a suit brought against it by any citizen of the State upon a claim or cause of action arising within the State. In a brief opinion this was declared upon the authority of *Harrison v. St. Louis & S. F. R. Co.*<sup>35</sup>

In *Terral v. Burke Construction Co.*<sup>36</sup> it was held that a State law was invalid which provided for the revocation of the license of a foreign corporation to do business within the State when it should remove a suit into a Federal court. In its opinion the court frankly admitted that the earlier cases dealing with the constitutional point at issue could not be reconciled, and then went on to declare the doctrine that the

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<sup>32</sup> 94 U. S. 535.

<sup>33</sup> 202 U. S. 248.

<sup>34</sup> 241 U. S. 329.

<sup>35</sup> 232 U. S. 318.

<sup>36</sup> 257 U. S. 529.



more recent decisions supported and which was in the future to be followed. The court said:

"The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to Federal courts in another, that State action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of *Doyle v. Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court."

In *Frost v. Railroad Commission*<sup>37</sup> the foregoing doctrine as finally arrived at was applied to invalidate a State law which, as construed by the Supreme Court of the State, provided that a private carrier might not use the highways of the State unless he should dedicate his property to the business of public transportation and submit to the duties and burdens imposed on common carriers. Thus to convert a private carrier into a common carrier against his will, the court declared, was to deny to him due process of law, and therefore to divest him of a right guaranteed to him by the Federal Constitution. After citing the *Terral* case and quoting from the minority opinions in the *Prewitt* and *Doyle* cases, the court referred to the case of *Western Union Tel. Co. v. Kansas*<sup>38</sup> in which it had been held that "The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from State taxation, direct or indirect, in respect of its inter-State business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the national Constitution."

The opinion in the instant case continued: "The principle, that a State is without power to impose an unconstitutional requirement as a condition

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<sup>37</sup> 271 U. S. 583.

<sup>38</sup> 216 U. S. 1.

for granting a privilege, is broader than the applications thus far made of it. . . . The States cannot use their most characteristic powers to reach unconstitutional results." <sup>39</sup>

In *Hanover Fire Ins. Co. v. Carr* <sup>40</sup> it was held that foreign corporations, after admission to a State, stand equal to and must be classified with domestic corporations of the same kind,<sup>41</sup> and that by entering the State and engaging in business therein on conditions imposed by the State, the foreign corporation does not make a contractual waiver of its right later to assert its Federal constitutional right to the equal protection of the laws.

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<sup>39</sup> The last sentence is quoted from the opinion of the court in *Burnes National Bank v. Duncan* (265 U. S. 17).

<sup>40</sup> 272 U. S. 494.

<sup>41</sup> The court said: "With respect to the admission fee, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal to and is to be classified with domestic corporations of the same kind."

## CHAPTER X

### THE FEDERAL CONTROL OF THE FORM OF STATE GOVERNMENTS

#### § 118. State Autonomy.

In the foregoing pages the sovereignty of the United States as opposed to, and inconsistent with, the continued sovereignty of its individual commonwealth members has been sufficiently declared. Whatever doubt there may have been upon this point before the Civil War, the result of that gigantic struggle left no room for disagreement since, and the subsequent unequivocal assertions of the Federal courts simply registered conclusions that no one could rationally question. Starting, then, from this fundamental fact that, looking at the matter from a purely legal viewpoint, the individual Commonwealths constitute self-governing but politically subordinate portions of the United States, we shall now proceed to consider the degree of autonomy secured them under the Federal Constitution. This subject we may conveniently divide into two parts. First, the examination of the degree of control that the Federal Government may constitutionally exercise over the form of government that the several States may establish for themselves; and, secondly, the consideration of the extent to which the General Government may supervise or control the exercise by the States of those powers that are reserved to them. First, then, as to the control that may be constitutionally exercised by the United States over the forms of government of its constituent units.

Speaking generally, it may be said that, providing its government be republican in form, each State of the Union may establish such governmental organs as it sees fit, and apportion among them its executive, legislative and judicial powers according to its own judgment as to what is expedient and proper.

#### § 119. Republican Form of Government Defined.

The Federal Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."<sup>1</sup>

In form, the first clause of this section would appear to be for the benefit of the States and to impose a duty upon the Federal Government, and such undoubtedly would be its effect should a foreign power attempt to impose a

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<sup>1</sup> Art. IV, Sec. 4.

government of any sort whatever upon the people of one of the States against their will; or should a domestic revolution result in the establishment of a government not sanctioned by law or not freely agreed to by the electorate. In fact, however, as is elsewhere described, and as will presently be more particularly spoken of, this clause was so interpreted during reconstruction times as to give to the Federal Government for several years an almost unlimited power of control of the domestic affairs of those States that had been in rebellion against its authority.

It will be noticed that the Constitution does not itself define the term "republican form of government." It has, however, always been an accepted rule of construction that the technical and special terms used in the Constitution are to be given that meaning which they had at the time that instrument was framed. This is but reasonable, for, in default of anything to the contrary, those who drafted the Constitution are to be presumed to have intended the words which they used to have that meaning they knew them to have. For a definition, then, of "republican government" we must discover what, in 1787, such a political form was considered to be. Certainly we may say that the governments of the thirteen original States as they existed at the time the Constitution was drafted must have been considered as illustrating the republican type. Furthermore, the Constitutions of all those States which have been admitted to the Union since 1787 must be regarded as having been impliedly considered republican by Congress at the time of the giving of its assent to their entrance into the Union.

The late Judge Cooley, in his *Principles of Constitutional Law*,<sup>2</sup> has perhaps defined the term as satisfactorily as anyone. "By a republican form of government," he says, "is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy, in which the people or community as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man as King, Emperor, Czar, or Sultan, or with that of one class of men, as an aristocracy." "In strictness," Judge Cooley goes on to say, "a republican government is by no means inconsistent with monarchical forms, for a King may be merely an hereditary or elective executive while the powers of legislation are left exclusively to a representative body freely chosen by the people. It is to be observed, however, that it is a republican form of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that by a republican form of government was intended a government in which not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose

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<sup>2</sup> Chapter XI.

the executive. But it would by no means follow that the whole body of people, or even the whole body of adult and competent persons, would be admitted to political privileges; and in any republican State the law must determine the qualifications for admission to the elective franchise."

In *Duncan v. McCall*,<sup>3</sup> Chief Justice Fuller was led to give a definition of a government republican in form by reason of the contention of the plaintiff in error that the State courts in the trial of criminal charges against him had applied laws that had not, in fact, been enacted by the State, and that, as a result, the government of the State, *quoad hoc*, was not republican in form. The Chief Justice said: "This is not the case of a system of laws attacked upon the ground of their invalidity as the product of revolution. By the Constitution a republican form of government is guaranteed to every State in the union, and the distinguishing feature of the form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are themselves the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majority."

In *United States v. South Carolina*,<sup>4</sup> a case decided in 1905, an *obiter* suggestion was made by the court in its majority opinion that a State by assuming the control of the manufacture and distribution of certain commodities, and, especially, by acquiring and undertaking the management of public utilities might thereby lose its republican form of government. To the suggestions thus made no weight can be given. Whether or not a government is republican in form depends not upon the sphere of its activities, but upon the manner in which its functionaries are selected, and the degree of their legal responsibility to the people. Thus there would be no difficulty in the most socialistic of States having a government of the purest republican type.

#### § 120. Dorr's Rebellion.

The first instance in which the Federal Government was called upon to construe this guaranty clause was in connection with Dorr's Rebellion in Rhode Island in 1841. The salient facts of this incident were these. The Constitution under which the people of Rhode Island had lived since the separation from England provided for a very limited suffrage. With the development of more democratic ideas this condition of affairs became very unsatisfactory to those who were thus denied the right to vote. Numerous attempts were made to have the Constitution amended, but these were always defeated by the small oligarchy of legal voters who did not wish to

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<sup>3</sup> 139 U. S. 449.

<sup>4</sup> 199 U. S. 437.

see their special privileges extended. Finally, in 1841, mass meetings of the discontented were held, and, without any instruction or permission from the existing government, the citizens were directed to elect, by a universal manhood suffrage, delegates to a constitutional convention. This was done, and at that convention a Constitution was framed that later was adopted by a clear majority of the adult male resident citizens of the State. Thereupon, the convention meeting again, declared: "Whereas, by return of the votes upon the Constitution, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said Constitution by a large majority; and the will of the people, thus decisively known, ought to be implicitly obeyed and faithfully executed: We do therefore resolve and declare that said Constitution rightfully ought to be, and is, paramount law and Constitution of the State of Rhode Island and Providence Plantations, and we further resolve and declare for ourselves and in behalf of the people whom we represent, that we will establish said Constitution and sustain and defend the same by all necessary means." Attempts were made to put into operation the government provided for in the instrument thus declared in force, Dorr being elected Governor under it.

All of the above acts, it will be observed, were unsanctioned by any law of the old *de jure* government. Upon an appeal being made by that government to the Federal Government for aid, the President of the United States recognized that government as the *de jure* government of the State and took steps to extend the aid that was requested. By this Federal executive action two important facts were established with reference to the "guaranty" clause of the Federal Constitution. The first of these was that, according to this clause, the Federal Government was obligated to protect the several States not only against the attempts of foreign powers to impose upon them governments not of their own choosing, but against revolutionary action on the part of their own citizens. The second was that it was thus decided that it is not a violation of the provision that a State government shall be republican in form, that it rests upon the legal will of a minority of its adult male citizens. In effect it was determined that the old government of Rhode Island, being accepted as republican in form at the time that the State became a member of the Union, it could not be changed by any extra-legal means against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State. This last clause "against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State," is advisedly added, for, as repeated instances have shown, the Federal Government has not felt itself obligated under the guaranty clause to see to it that none of the State Constitutions are ever amended or replaced by new instruments except in strict accordance with the provisions governing constitutional changes existing at the time the changes are made. When such

changes, even though brought about in a manner not formally constitutional, have been accepted as valid by the old governments, the Federal Government has not felt itself obligated to interfere. But when, as was the case in Rhode Island, the revolutionary change is resisted by those exercising authority under the old instrument of government, the Federal Government, upon appeal to it for assistance, will almost surely consider itself called upon to recognize and support the old government.

§ 121. *Luther v. Borden.*

The case of *Luther v. Borden*,<sup>5</sup> decided by the Supreme Court in 1845, arose out of Dorr's Rebellion. Borden, acting under authority of the old government of Rhode Island, had broken into the house of Luther, who was at the time engaged in an attempt to establish the new government provided for by the Constitution that had been adopted in the popular, extra-constitutional manner spoken of above. Upon being sued in trespass by Luther, Borden justified himself by the plea that he was acting under the authority of the legal government of the State. Luther, upon his side, denied the *de jure* character of that government, and, therefore, its legal competence to empower Borden to exercise the authority he had exercised.

Upon behalf of Luther it was argued "that, by the fundamental principle of government and of the sovereignty of the people acknowledged and acted upon in the United States, and the several States thereof, at least ever since the Declaration of Independence in 1776, the Constitution and frame of government prepared, adopted, and established as above set forth, was, and became thereby, the supreme fundamental law of the State of Rhode Island, and was in full force and effect, as such, when the trespass alleged in the plaintiff's writ was committed by the defendants. That this conclusion also follows from one of the foregoing fundamental principles of the American system of government, which is, that government is instituted by the people, and for the benefit, protection and security of the people, nation, or community. And that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable right to reform, alter, abolish the same, in such a manner as shall be judged most conducive to the public weal."<sup>6</sup>

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<sup>5</sup> 7 How. 1.

<sup>6</sup> In support of this position, the following propositions were urged:

1. "That the sovereignty of the people is supreme, and may act in forming government without the assent of the existing government.
2. "That the people are the sole judges of the form of government best calculated to promote their safety and happiness.
3. "That as the sovereign power, they have the right to adopt such form of government.

In behalf of the defendant in error, Borden, Daniel Webster, who was one of the counsel, argued that, granting that the people are the source of political power, the American principle is that they can exercise this power only through their constituted representatives, and through the votes of properly qualified electors. "The right to choose a representative," he declared, "is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is, that the qualification which entitles a man to vote must be prescribed by previous laws, directing how it is to be exercised and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. . . . Our American mode of government does not draw any power from tumultuous assemblages."

The question as to which of the two governments was at that time the legal government of the State thus seemed squarely presented to the court. That tribunal, however, did not feel itself obliged to pass upon the point, holding that the power to determine such a matter had been given by the Constitution to Congress, and by that body had been handed over, to the extent at least of determining when the Federal Government should interfere, to the President. In the case at bar the President had recognized the legality of the old government and the propriety of this decision the court declared it could not consider.<sup>7</sup>

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4. "That the right to adopt necessarily includes the right to abolish, to reform, and to alter any existing form of government, and to substitute in its stead any other that they may judge better adapted to the purposes intended.

5. "That if such a right exists at all, it exists in the States under the Union not as a right of force, but a right of sovereignty, and that those who oppose its peaceful exercise, and not those who support it, are culpable.

6. "That the exercise of this right, which is a right original, sovereign, and supreme, and not derived from any other human authority, may be, and must be, effected in such a way and manner as the people may for themselves determine.

7. "And more especially is this true in the case of the then subsisting government of Rhode Island, which derived no power from the charter or from the people to alter or amend the frame of government, or to change the basis of representation, or even to propose initiatory measures to that end."

<sup>7</sup> "Under this article of the Constitution," said the court, speaking through Taney, C. J., "it rests with Congress to decide what government is the established one in the State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can be determined whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . . So, too, as relates to the clause in the above-mentioned article of the Constitu-



"After the President has acted, and has called out the militia," continued the court, "is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President is endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful." As to the point that a discretionary power thus placed in the hands of the President might be abused, the court said: "All power may be abused if placed in unworthy hands. But it would be difficult to point out any other hands in which this power would be more safe, and at the same time equally effectual. . . . At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected, and enforced in its judicial tribunals."

As regards the point that had been raised that by the declaration of martial law and the use of military force, the old government of Rhode Island had ceased to be a republican one, the court said: "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military authority to put down an armed insurrection, too strong to be controlled by the civil

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tion, provided for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise. . . . By this act (Feb. 28, 1795) the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . . And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by act of Congress."

authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government."<sup>8</sup>

**§ 122. The Reconstruction of Southern States after the Civil War.**

Acting under the authority assumed to be given it by the guaranty clause, Congress, at the conclusion of the Civil War, assumed an almost complete control over the reconstruction of governments in those States. There can be no question, however, but that in doing so an interpretation was given to that clause which it is difficult to justify. Practical exigencies may have necessitated the Federal authority that was exercised, but that violence was done to the meaning of this clause must be admitted. A fair interpretation of this clause would have given to the Federal Government at the most nothing more than the right to assist the citizens of the several States in establishing and maintaining governments republican in form and loyal to the Union. When this clause was discussed in the Constitutional Convention of 1787 it was explained by one member that its object was "merely to secure the States against dangerous commotions, insurrections, and rebellions"; and Madison, writing in *The Federalist*, said: "It may possibly be asked what need there could be for such a precaution, and whether it may not become a pretext for alteration in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of interprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the General Government should interpose by virtue of this constitutional authority, it will of course be bound to pursue the authority. But the authority extends no further than a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

Instead, however, of guaranteeing existing governments in the Southern States, or of assisting their citizens in establishing republican governments, the Federal Government, in pursuance of the various Recon-

<sup>8</sup> For a fuller discussion of martial law, and its limitations, see *post*, Chapter LXXXVII.

struction Acts passed by Congress, went on itself to assume the practical control of the establishment of new governments; and these governments it termed republican in form, though they were imposed upon the States against the will of the great bulk of their citizens, and were maintained in existence by the support that the Federal bayonet was able to give them. Furthermore, Congress even then refused to admit the States to a full enjoyment of constitutional rights until they had amended their Constitutions in certain specific ways, and ratified the Fourteenth and Fifteenth Amendments to the Federal Constitution. In so doing, not only was violence done to the guaranty clause, but the States in question were deprived of that equality with the other States of the Union to which they were constitutionally entitled.

In an earlier chapter it has been pointed out that in the famous case of *Texas v. White*<sup>9</sup> the Supreme Court construed the "guaranty" clause of the United States Constitution to authorize Congress to establish and maintain governments in those States which had attempted secession from the Union. It will be remembered, however, that in that case the court did not feel itself called upon to pass upon the constitutionality of any of the particular provisions of the Reconstruction Acts which were enacted by Congress in the exercise of that power, but was content with satisfying itself that the government which had been established and had been in actual operation, had been recognized by Congress, and was, as such, competent to bring suit in behalf of the State of Texas, which, it was declared, had never been, despite its ordinance of secession, out of the Union.<sup>10</sup>

In *White v. Hart*<sup>11</sup> an attempt was made to have the Supreme Court hold void certain provisions of the reconstruction Constitution of Georgia on the ground that the Constitution had been adopted under the dictation and coercion of Congress, and was not thus, in reality, the act of the State. The Supreme Court replied: "Congress authorized the State to frame a new Constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one, in which the judicial is bound to follow the action of the political department." In short, the court held that whether or not Congress was justified in requiring of the State that, as a condition to her again enjoying representation in Congress, she should adopt a Constitution containing certain provisions, the State had yielded and adopted a Constitution as required.

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<sup>9</sup> 7 Wall. 700.

<sup>10</sup> See Chapter IV.

<sup>11</sup> 13 Wall. 646.

It was therefore her act, and its provisions were valid as such. Had she continued to refuse to accede to the conditions imposed by Congress, it might ultimately have been necessary to decide whether those conditions were constitutionally requirable. But, having yielded to them, the court very properly held that it could not examine into the motives or circumstances which led the State to do so.

**§ 123. Restricted Suffrage Compatible with Republican Form of Government.**

In *Minor v. Happersett*<sup>12</sup> the point was raised that a State government is not republican in form in which adult women are not permitted to vote. As to this the court said: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution. As has been seen [in the argument that has gone before], all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters."<sup>13</sup>

In *Forsyth v. Hammond*,<sup>14</sup> the court declared: "It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under Section 4 of Article IV of the Constitution, the United States are bound to guarantee to every State in this Union."

<sup>12</sup> 21 Wall. 162.

<sup>13</sup> In this case was also negatived the point that to deny women the suffrage is to deprive them of a right guaranteed to them by the Fourteenth Amendment.

<sup>14</sup> 166 U. S. 506.

### § 124. State Initiative and Referendum Laws.

There have been some decisions of State courts that general or state-wide initiative or referendum laws or State constitutional provisions providing for the exercise of such legislative powers upon the part of the electorate are in violation of the Federal Constitution in that their effect is to substitute, *pro tanto*, direct democratic, for republican or representative, government. Thus, in 1847, in *Rice v. Foster*,<sup>15</sup> we find the court of Delaware saying: "Although the people have the power, in conformity with its provisions, to alter the Constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government." And this, the court went on to declare, would in effect be done should the electorate be given a direct legislative power.<sup>16</sup>

In later cases, however, the State courts have found little difficulty in harmonizing the initiative and referendum with the concept of a republican form of government.<sup>17</sup> Thus in *Kadderley v. Portland*,<sup>18</sup> the court declared with reference to an amendment to the State Constitution: "The initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the Government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the Government, or substituted another in its place. The Government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will."

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<sup>15</sup> 4 Harr. 479.

<sup>16</sup> To the same effect see the decision of a Pennsylvania court in the same year in *Parker v. Commonwealth* (6 Barr. 507).

<sup>17</sup> Special or local option laws with reference to municipal incorporation, or other local governing powers, the regulation of the production and sale of intoxicating liquors, etc., have not come under the judicial objection of even those courts which have deemed the state-wide initiative and referendum laws unconstitutional.

For a discussion of initiative and referendum statutory provisions as related to the principle that constitutionally delegated legislative powers may not be delegated, see *post*, § 1086.

<sup>18</sup> 74 Pac. 719.

The courts of Missouri and Oklahoma have repeatedly upheld the initiative and referendum provisions of their respective State Constitutions.<sup>19</sup>

**§ 125. State Initiative and Referendum Provisions before the Supreme Court.**

In *Pacific States Telephone and Telegraph Co. v. Oregon*, decided in 1912, the attempt was made to obtain from the Federal Supreme Court a determination as to the compatibility of State initiative and referendum provisions with the requirements of a government republican in form. The plaintiff in error had protested the payment of a tax authorized by a law which had been "initiated" by the people; the Supreme Court of the State had affirmed a judgment of the lower court against the company, and, upon writ of error to the Federal Supreme Court, the company had urged, as it had urged in the State courts, that the initiative provision of the State Constitution was in violation of Article IV, Section 4 of the Federal Constitution.<sup>20</sup> The Supreme Court dismissed the appeal on ground of lack of jurisdiction, the issues raised being declared political in character and therefore not justiciable. After an extended review of *Luther v. Borden*,<sup>21</sup> and quotation from the opinion of Chief Justice Taney in that case, Chief Justice White, speaking for a unanimous court, said:

"The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

<sup>19</sup> See *Halliburton v. Roach* (130 S. W. 689); *Ex parte Wagner* (95 Pac. 435).

<sup>20</sup> Six several objections to this initiative provision were raised by the plaintiff in error, but, as the Supreme Court found, all of them were resolvable into the one as to its compatibility with Article IV, Section 4 of the United States Constitution.

<sup>21</sup> 7 How. 1.

"As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction."

In *Marshall v. Dye*,<sup>22</sup> the submission of a proposed new Constitution for the State of Indiana to the vote of the electorate had been prevented by an injunction issued by a State court upon the ground that the statute providing for the submission was unconstitutional as tested by the then existing State Constitution. This action of the lower court was affirmed by the Supreme Court of the State, whereupon the case was taken by writ of error to the Federal Supreme Court. It was contended that this refusal upon the part of the State courts to permit the people to express their constituent will was, in effect, to destroy republican government in and over the State. The Supreme Court dismissed this contention with the statement that the full treatment of the subject in *Pacific Telephone and Telegraph Co. v. Oregon* made unnecessary a further argument as to the non-justiciable character of the issue raised.

In *Ohio v. Hildebrand*,<sup>23</sup> the attempt was again made, but without success, to obtain from the Federal Supreme Court a ruling as to whether a State government was republican in form. By the Constitution of the State adopted in 1912, the legislative power had been expressly vested not only in the Senate and House of Representatives of the State, but in the people in whom a right was reserved, to approve or disapprove by popular vote any law enacted by the General Assembly. The contention that this was in violation of Article IV, Section 4, of the Federal Constitution "must rest," said the court, "upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus that destroys the power, which in effect annihilates representative government, and causes a State where such condition exists to be not republican in form." This proposition, and the argument in support of it, said the court, disregarded "the settled rule that the question of whether that guarantee of the [Federal] Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."

#### § 126. Federal Authority with Reference to Contesting State Governments.

Precedents have established the principle that where there is a dispute in a State as to the *de jure* character of a particular organ of its government, as, for example, as to which of two individuals has been elected as chief

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<sup>22</sup> 231 U. S. 250.

<sup>23</sup> 241 U. S. 565.

executive, or which of two courts or legislatures is entitled to authority, the Federal Government will not ordinarily interfere, being governed by the principle that each State government has a tribunal for the decision of such contests, and that the General Government will consider itself bound by the decision which that tribunal renders, just as the Federal courts hold themselves bound by the decisions of the State courts as to the existence and, in general, the interpretation of their respective State statutes.<sup>24</sup>

In two classes of cases, however, the Federal Government exercises the right to decide which of two contesting State officials or organs is to be recognized as the *de jure* authority. The first of these includes those cases in which a decision becomes necessary in order to determine a matter of direct Federal concern. Thus, formerly, when each of two contesting State legislatures selected and sent senators to Congress, it was necessary for the United States Senate to decide which of the two electing bodies was endowed with the authority to act on that behalf for the State. So, also, as in the case of Dorr's Rebellion, where Federal aid is needed to suppress domestic disorder, it is necessary for the President or Congress to determine which government, claiming authority, it will recognize.

The second class of cases in which the Federal Government, through its Supreme Court, will assume jurisdiction of a dispute between parties as to who is entitled to a State office, is where a claim is made that the State laws, as applied by the State authorities, in settlement of the dispute, have violated that provision of the Fourteenth Amendment which declares that no State "shall deprive any person of life, liberty, or property, without due process of law," or have violated the tenth section of Article One of the Constitution of the United States, which declares that no State shall pass a law impairing the obligation of a contract.

#### § 127. Public Office Not a Property or Contract Right.

The Supreme Court of the United States has held in an unqualified manner, that, as between a State and an office-holder, there is no contract right possessed by the latter either to the office or to the salary attached to it, and that, therefore, in the absence of express constitutional provision otherwise, his removal from office or the abolishment of the office itself gives to him no cause of action against the State. Thus in *Butler v. Pennsylvania* <sup>25</sup> after defining vested private rights of property, the court said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed, private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or dis-

<sup>24</sup> See *post*, Chapter LXXII.

<sup>25</sup> 10 How. 402.



continued as the public shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor promised, would appear to be neither reconcilable with natural justice nor with common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes would be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a State, as constitutional ordinances must be of higher order and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect and competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power or the extent of its exercise may be controlled by higher organic law or the Constitution of the State, as is the case in some instances in the State Constitutions, and is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone."

Again, summing up the law on this subject, the Supreme Court in *Taylor v. Beckham*<sup>26</sup> said: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of

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<sup>26</sup> 178 U. S. 548.

the relation of a public officer to the public is inconsistent either with a property or contract right." <sup>27</sup>

**§ 128. Suits Between Two or More Claimants to State Office.**

When the dispute is not one between the State and one of its officers, but between two individuals each claiming the office and its emoluments,—when, in other words, the office itself is not disturbed nor the salary changed, the question is a different one. Then, it would seem, the office has often to be treated as a piece of property of which the owner may not be deprived without due process of law even by the State itself. In *Kennard v. Louisiana* <sup>28</sup> an action in the nature of quo warranto was brought against the plaintiff in error, a justice of the Supreme Court of the State, by a Mr. Morgan, and the decision of the Louisiana courts was in his favor. Thereupon Kennard took an appeal to the Supreme Court of the United States upon the ground that, through its judiciary, the State had deprived him of his office without that due process of law which the Fourteenth Amendment secured to him. In its opinion the Supreme Court of the United States said: "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." And, directing its examination to this point, the court found that in fact due process of law had been provided in the trial of his right to office which he claimed. In thus assuming jurisdiction of the case, and in examining as to whether in fact due process of law had been had, it is apparent that the Supreme Court must have held that the right to the office in question was a property right within the terms of the provision of the Fourteenth Amendment which declares that no State shall deprive a person of life, liberty, or property without due process of law.

Again, in *Foster v. Kansas*, <sup>29</sup> the Federal court assumed jurisdiction in a case where the Supreme Court of Kansas had ousted the plaintiff in error from office, the court in its opinion saying: "As the question of the con-

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<sup>27</sup> It is to be observed, however, that where a State in a fiscal capacity enters into contracts with private persons for services to be rendered or materials to be furnished, it is to be regarded *pro hac vice* as a private person and as bound accordingly. "When a State becomes a party to a contract as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." *Davis v. Gray* (16 Wall. 203). See also *Curran v. Arkansas* (15 How. 304).

<sup>28</sup> 92 U. S. 480.

<sup>29</sup> 112 U. S. 205.

stitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction and the motion to dismiss must be overruled;" thus affirming the decision of the State court on the ground that the proceedings showed due process of law.

In *Boyd v. Nebraska*<sup>30</sup> the State Supreme Court had ousted Boyd from the office of governor and installed one Thayer therein. On error to the Federal Supreme Court, the judgment of the State Supreme Court was reversed, Thayer ousted, and Boyd reinstated as governor of the State, the ground for this action being that in the proceedings by which Boyd had been originally ousted, the State court had incorrectly decided that he was not a citizen of the United States and therefore disqualified for office. In its opinion, the court said: "As the allegation [of citizenship] . . . sets up a right and privilege claimed under the laws of the United States, this court must determine for itself the question of sufficiency of this allegation, and is not concluded by the view taken of that question by the Supreme Court of Nebraska." The statement that a Federal right or privilege was here claimed, would not seem to be correct. No right or privilege attached to, or growing out of Federal citizenship was claimed. The judgment of the State court should have been affirmed irrespective of the fact whether or not in truth Boyd was a citizen of the United States.<sup>31</sup>

In *Wilson v. North Carolina*<sup>32</sup> the Supreme Court of the United States

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<sup>30</sup> 143 U. S. 135.

<sup>31</sup> In an emphatic dissenting opinion Justice Field said: "I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities. . . . The fact that one of the qualifications prescribed by the State for its officers can only be ascertained and established by considering the provisions of the law of the United States in no way authorizes an interference by the General Government with the State action. Because an officer of a State must [according to the Constitution or statutes of that State] be a citizen of the United States, it does not follow that the tribunals of the United States can alone determine that fact, and that the decision of the State in respect to it can be supervised and controlled by the Federal authorities. . . . The office of sheriff was not a right or privilege claimed under a law of the United States, but was a right or privilege claimed by the election under the laws of Missouri. The mere fact that it was necessary that the incumbent of the office should also be a citizen of the United States, did not of itself give him a right to that office. . . . My objection to the decision is not diminished by the fact that there is no power in this court to enforce its decision upon the State of Nebraska should resistance be made to it. Should the incumbent declared by this court not to be entitled to the office refuse to surrender it and the State authorities should stand by him in such refusal, what could be done about it? . . . If the right of this court to interfere in this case can be sustained, every candidate for office alleging that the successful party has not some qualification prescribed by statute, which can only be defined by reference to a Federal law, will claim a right to invoke the interference of the Federal judiciary to determine whether he ought or not to have been declared elected."

<sup>32</sup> 169 U. S. 586.

was again called upon to determine whether the plaintiff in error had, by being ousted from office, been deprived of property without due process of law. In its opinion the court again affirmed the doctrine that "the procedure provided by a valid State law for the purpose of changing the incumbent of a State office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of a policy of a State with reference to its political and internal administration, and a decision of the State court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question."

#### § 129. *Taylor v. Beckham.*

The latest case upon the point under consideration is that of *Taylor v. Beckham*,<sup>33</sup> decided in 1900. This case arose out of the following facts. At a general election held in November, 1899, in Kentucky, William Goebel and J. C. W. Beckham were the democratic nominees for the offices of governor and lieutenant-governor respectively, and William S. Taylor and John Marshall were the republican candidates. The State board of election commissioners whose duty it was to canvass the returns, determined that Taylor and Marshall were elected, and they were thereupon inducted into office. Goebel and Beckham contested the election upon various grounds, boards of contest were organized, and reported their decisions to the General Assembly for its action thereupon as provided by law. These reports, which were approved by the Assembly, found that Goebel and Beckham had been elected. They were then duly sworn and inducted into office. In February, 1900, Goebel died and Beckham succeeded to the governorship. Taylor and Marshall, however, refused to recognize the validity of the proceedings whereby Goebel and Beckham had been declared elected, and declined to surrender the records and other papers pertaining to the office of governor or to vacate the executive offices in the capitol building at Frankfort. Whereupon Beckham brought an action in the nature of a quo warranto in the Circuit Court of the State against Taylor and Marshall. Judgment of ouster was rendered in favor of the plaintiff. The case was carried on appeal to the Court of Appeals of Kentucky and the judgment affirmed; whereupon a writ of error was obtained by Taylor and Marshall from the Supreme Court of the United States. The Supreme Court dismissed the writ of error.

Two grounds for Federal interference had been set up by the plaintiffs in error: (1) That the proceedings by which they had been ousted from office were not compatible with a republican form of government; (2) that they had been deprived of a property right without due process of law.

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<sup>33</sup> 178 U. S. 548.

As to the first contention, the court held that the Commonwealth of Kentucky being in full possession of its faculties as a member of the Union, no exigency had arisen requiring the interference of the Federal Government to enforce the guaranty clause. As to the second point, the court said: "The contention is that, although the statute furnished due process of law, the General Assembly in administering the statute denied it, and that the Court of Appeals in holding to the rule that where a mode of contesting elections is specifically provided by the Constitution, or laws of a State, that mode is exclusive, and in holding that, as the power to determine was vested in the General Assembly of Kentucky, the decision of that body was not subject to a judicial revision, denied a right claimed under the Federal Constitution. The Court of Appeals did, indeed, adjudge that the case did not come within the Fourteenth Amendment, because the right to hold the office of governor or lieutenant-governor of Kentucky was not property in itself, and being created by the Constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that, in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by that amendment."

The court, after an examination of authorities, declared that the Kentucky court had been correct in thus holding that a public office is not property, and said: "It is clear [then] that the judgment of the Court of Appeals, in declining to go behind the decision of the tribunal vested by the State Constitution and laws with the ultimate determination of the right to these offices, denied no right secured by the Fourteenth Amendment."

In assuming the position here taken as to non-property character of a public office and in dismissing the writ of error on that ground, it would seem that the court was scarcely in harmony with its preceding decisions, in several of which, as we have already seen, by assuming jurisdiction, and by examining the character of the processes by which the contests for office had been settled to see if they provided due process of law, it had assumed that as between two contestants for an office, the right to an office and its emoluments was a property right within the meaning of the Fourteenth Amendment.<sup>34</sup>

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<sup>34</sup> Thus Justice Brewer, in his dissenting opinion, said "I agree fully with those decisions which are referred to [in the majority opinion], and which hold that as between the State and the office holder there is no contract right either to the term of office or to the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary. But when the office is not disturbed, when the salary is not changed, and when, under the Constitution of the State, neither can be by the legislature, and the question is simply whether one shall be deprived of that office and its salary, and both given to another, a different question is presented,

### § 130. Federal Control of Suffrage in the States.

By the Fourteenth Amendment it is provided that "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is

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and in such a case to hold that the incumbent has no property in the office, with its accompanying salary, does not commend itself to my judgment." Justice Brewer went on to argue, however, that the judgment of the Court of Appeals of Kentucky should have been affirmed for the reason that due process of law had been observed. "But," he concluded, "because, as I understand the law, this court has jurisdiction to review a judgment of the highest court of a State ousting one from his office and giving it to another, and a right to inquire whether that judgment is right or wrong in respect to any Federal question such as due process of law, I think the writ of error should not be dismissed, but that the judgment of the Court of Appeals of Kentucky should be affirmed." Justice Brown concurred in the opinion rendered by Justice Brewer.

A dissenting opinion was also rendered in this case by Justice Harlan. In this he argued not only that the writ of error should not have been dismissed, but that the court should adjudge that the decree in the State court had taken from Taylor and Marshall rights protected by the Fourteenth Amendment. In agreement with Justices Brewer and Brown he argued that as between two claimants a public office is property, and had been so held by the Supreme Court in previous cases. But he went even further than this, and brought the right of office within the meaning of the term "liberty" as used in the Fourteenth Amendment. "What more directly involves the liberty of the citizen," he said, "than to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow citizens? What more certainly infringes upon his liberty than for the legislature of the State, by merely arbitrary action, in violation of the rules and forms required by due process of law, to take from him the right to discharge the public duties imposed upon him by his fellow citizens in accordance with the law? . . . I grant that it is competent for a State to provide for the determination of contested election cases by the legislature. All that I now seek to maintain is the proposition that when a State legislature deals with a matter within its jurisdiction, and which involves the life, liberty or property of the citizen, it cannot ignore the requirement of due process of law. . . . Looking into the record before us, I find such action taken by the body claiming to be organized as the lawful legislature of Kentucky as was discreditable in the last degree and unworthy of the free people whom it professed to represent." After a statement of the facts which in his opinion justified this characterization of the action of the legislature, Justice Harlan concluded: "Those who composed that body seemed to have shut their eyes against the proof for fear that it would compel them to respect the popular will as expressed at the polls. Indignant, as naturally they were and should have been, at the assassination of their leader, they proceeded in defiance of all forms of law and in contempt of the principles upon which free government rests, to avenge that terrible crime, namely, the destruction by arbitrary methods of the right of the people to choose their chief magistrate. The former crime, if the offender be discovered, can be punished as directed by law. The latter should not be rewarded by a declaration of the inability of the judiciary to protect public and private rights, and thereby the rights of voters, against the wilful, arbitrary action of a legislative tribunal which, we must assume from the record, deliberately acted upon a contested election case involving the rights of the people and of their chosen representative in the office of governor without looking into the evidence upon which alone any lawful determination of the case could be made. The assassination of an individual

denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." No serious attempt has been made to enforce this constitutional mandate, although, as is well known, in a number of the States, by one means or another, the suffrage has been, in effect, denied to male adult citizens upon grounds other than those specified in the Amendment.

By the Fifteenth Amendment it is declared in unqualified terms that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." And, by the Nineteenth Amendment it is declared that "the right of citizens to vote shall not be denied or abridged by the United States or by any State on account of sex."

#### § 131. Federal Control of Eligibility to State Offices.

There is no express provision in the Federal Constitution in limitation of the plenary right of the States to determine the qualifications for election or appointment to State offices. It would seem, therefore, that should they, or any of them, see fit to disqualify persons for public office on account of sex or color or for any other reason, they would be within their constitutional right so far as the Federal Constitution is concerned.

There are no cases, so far as the author knows, which expressly declare this doctrine, but there are State decisions which imply it. A recent decision, though it can hardly be called a "case" upon this point is that of *In re Opinion of the Justices*,<sup>35</sup> in which the Supreme Court of New Hampshire, upon being asked by the Governor and Council of the State, as per-

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demands the severest punishment which it is competent for human laws in a free land to prescribe. But the overturning of the public will, as expressed at the ballot box, without evidence or against evidence, in order to accomplish partisan ends, is a crime against free government, and deserves the execration of all lovers of liberty. . . . I cannot believe that the judiciary is helpless in the presence of such a crime. The person elected as well as the people who elected him, have rights that the courts may protect. To say that in such an emergency the judiciary cannot interfere is to subordinate the right to mere power, and to recognize the legislature of a State as above the supreme law of the land. . . . The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law."

<sup>35</sup> 139 Atl. Rep. 180 (1927).

mitted by the Constitution of that State, whether the Nineteenth Amendment to the United States Constitution operated to qualify women for appointment to State offices, although they were not so qualified by the Constitution of the State, replied that it did not. The court pointed out that in some instances State courts had held that the adoption of the Nineteenth Amendment had operated to remove a presumption against the constitutional eligibility of women to hold public office—a presumption based upon an apparent acceptance of the doctrine that the right to hold public office was intended to be measured by the right to vote; but that it had been generally held that, granting the removal of constitutional disability, legislative action was required in order that the common-law rule of disability of women to hold public office might be done away with.<sup>36</sup> The court said: "The Federal Amendment, relating to the right of suffrage only, did not change or impair the provisions of our Constitution limiting the right to hold office."<sup>37</sup>

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<sup>36</sup> Citing *Opinion of the Justices* (240 Mass. 601); *Opinion of the Justices* (119 Me. 603); *State v. James* (96 N. J. Law, 132); *People v. Barltz* (212 Mich. 580).

<sup>37</sup> The court, however, held that the State Constitution intended that those having the right to vote should be eligible to elective offices, and, therefore, that the effect of the Nineteenth Amendment, by broadening the suffrage so as to make it include women, was to make women eligible to such offices. This eligibility, however, remained one that was fixed by the State Constitution. As the court said: "The class which can be elected is enlarged by the Federal Amendment because the Amendment enlarges the group from which, by our Constitution, officer holders may be chosen." Citing *Commonwealth v. Maxwell* (271 Pa. 378), and *Neal v. Delaware* (103 U. S. 370).



## CHAPTER XI

### FEDERAL SUPERVISION OF STATE ACTIVITIES

#### § 132. The Fourteenth Amendment.

In the chapters which have gone before, the manner in which the Federal Government is secured from interference on the part of the States has been considered. We turn now to a topic which, while closely related to this subject, is yet distinct from it. This topic is the extent of the constitutional power of the Federal Government to examine State laws and supervise their execution with a view to seeing that they do not infringe in any way upon the rights secured to individuals by the Federal Constitution. In other words, the question now to be considered is not the maintenance of the supremacy of the Federal Government, but the protection of individuals in the enjoyment of the rights and immunities guaranteed to them by the Federal Constitution.

Prior to the adoption of the Fourteenth Amendment in 1868 the laws of the individual States, so long as they related to subjects over which the States had the right of legislation, were not subject to examination in Federal courts with a view to ascertaining whether they deprived anyone of life, liberty, or property without due process of law, or denied to anyone equal legal protection. The first nine amendments to the Federal Constitution which enumerated the fundamental rights of individuals that might not be violated were, from the beginning, construed to limit not the States but only the Federal Government. Until, therefore, the Fourteenth Amendment was adopted there was, so far as the Federal Constitution and laws were concerned, nothing to prevent the several States from enacting laws which denied to their own citizens the equal protection of the laws or deprived them of life, liberty, and property, without due process of law. The only express limitations laid upon the States by the Constitution with reference to distinctively private rights, were that they should enact no bills of attainder, or *ex post facto* laws, or laws impairing the obligation of contracts or make anything but gold and silver coin a tender in payment of debts. As a matter of fact, all of the States had, by their own Constitutions, taken from their legislatures the power to enact laws upon certain specified topics, and forbidden them to violate certain declared principles of justice and right. But the adoption of these constitutional limitations had been purely voluntary upon their part. As regards what is now known as due process of law upon its substantive side, the general expectation, and, to a considerable extent, the judicial doctrine, was that private property

rights would be protected against legislative spoliation by asserting the sanctity of "vested rights."<sup>1</sup>

In 1868, however, as one of the results of the Civil War, the Fourteenth Amendment was adopted, which, after declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," goes on to provide that, "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For a number of years after the adoption of this Amendment it was by no means certain that the effect of the above-cited provisions would not be to endow the United States Government with additional legislative powers so great as fundamentally to alter the nature of the Union itself. There can be no question that the clauses of the Amendment which have been quoted were easily susceptible of an interpretation that would have given them this result, and that, at the time they were framed and adopted by Congress and ratified by the necessary number of State legislatures, there were very many who believed that they would, and desired that they should, work this revolutionary change in the American constitutional system.<sup>2</sup> Fortunately, however, as all must now believe, the Supreme Court was led to give to these words a construction that has robbed them of such an effect.

In the pages which immediately follow there will not be attempted a comprehensive examination of the manner in which the Fourteenth Amend-

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<sup>1</sup> "In this aspect of the matter, the leading doctrine of constitutional law during the first generation of our history was the doctrine of *vested rights*, under warrant of which the courts treated any legislative enactment unduly infringing upon property rights without making compensation to the owners, as utterly beyond the purview of the legislative power, even though not specifically inhibited by the letter of the written Constitution. *Van Horne v. Dornance* (2 Dall. 309); *Calder v. Bull* (3 Dall. 386); *Dash v. Van Kleeck* (7 Johns. 498). This doctrine at first set forth in mere dicta, soon found wide acceptance, having marked effect on other concepts of Constitutional law. It was on this basis that Kent established the doctrine that the power of eminent domain could be exercised for a public purpose only, that is, for a purpose judged by the courts to be public, and the further doctrine that in exercising the power of eminent domain the State must make compensation not only for the property actually taken, but also for incidental damages accruing to adjoining property. On the same foundation, too, it is that Marshall's doctrine in the *Dartmouth College* case ultimately rests." E. S. Corwin, *National Supremacy*, p. 113.

<sup>2</sup> See especially the debates attendant upon the passage of the Civil Rights Bill of 1866, the doubts as to the constitutionality of which led to the adoption of the Fourteenth Amendment. See also the dissenting opinion of Justice Field in the *Slaughter House Cases* (16 Wall. 36), and of Justice Harlan in the *Civil Rights Cases* (109 U. S. 3). See also Flack, *The Adoption of the Fourteenth Amendment*.

ment has been interpreted. This will be found, under specific heads, in subsequent chapters. In the present chapter the discussion will be limited to the question as to the extent to which the Amendment altered the general character of the American constitutional system, and especially the extent to which Congress was given an increased legislative power, or the Federal Government a broadened jurisdiction to oversee and control the manner in which the States exercise their reserved powers.

**§ 133. Federal Privileges and Immunities—The Slaughter House Cases.**

The famous Slaughter House cases,<sup>3</sup> decided in 1873, grew out of the following facts: The State of Louisiana in the exercise of its "police powers," had passed an act chartering a company, and giving to it the exclusive right to establish and maintain stock-yards, landing places, and slaughter houses in the City of New Orleans, and providing that all animals intended for food should be slaughtered there. The plaintiffs in the cases that have since come to be known as the "Slaughter House Cases" alleged that this act was unconstitutional as tested by the Federal Constitution on the several grounds that it was in violation of the Thirteenth Amendment in that it created an involuntary servitude upon the part of those who were compelled to resort to this privileged company; and that it was in violation of the Fourteenth Amendment in that it deprived persons of liberty and property without due process of law, denied to them the equal protection of the laws, and abridged the privileges and immunities of citizens of the United States. It is only with this last claim that we are now concerned.

As we shall later see, the Fourteenth Amendment has been construed to give to the Federal courts the power of examining whether, in the exercise of their ordinary police and other powers, the States have denied to anyone due process of law or the equal protection of the laws. The claim however that the rights and immunities which were alleged to have been violated by the Louisiana statute come within the scope of the phrase "privileges or immunities of citizens of the United States" as used in the Fourteenth Amendment, raised the fundamental question whether or not, by that Amendment, the entire so-called "police powers" of the States had been placed within the direct legislative definition and control of Congress. This would have resulted from the fact that by the Amendment Congress is given authority to enforce its provisions by appropriate legislation. If, therefore, such a right as was here alleged to have been violated could be held to be a Federal right it would be within the power of Congress to define it, and all other similar rights, and to impose penalties upon their violation, and thus to deprive the States of their entire police powers. These police powers, it is scarcely necessary to observe, cover almost the entire field of private rights, personal and proprietary, including, as they do, the general

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<sup>3</sup> 16 Wall. 36; 21 L. ed. 394.

authority of the State to legislate regarding the social, economic, and moral welfare of its citizens. To have granted the contention of the plaintiffs would thus have made Congress, instead of the State legislatures, the possible source of the great body of private laws by which the citizen is governed. It is, therefore, not surprising that the court in its majority opinion should have said: "We do not conceal from ourselves the great responsibility which . . . devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."

The argument of the plaintiffs which did not convince the majority of the court, but which did convince the minority, was that the individual, as a free man and citizen of a State, had, before the adoption of the Amendment, certain fundamental rights, privileges, and immunities, which were determined by State statutes and the general principles of the common law, and that by that Amendment the citizen became primarily a citizen of the United States, and only secondarily, by residence, a citizen of a particular State of the Union, and that, therefore, these fundamental rights, privileges, and immunities which formerly belonged to him as a citizen of the State in which he lived now became his as a citizen of the United States, and, as such, no longer subject to abridgment by the States. Only by this interpretation, it was argued, could the clause of the Amendment which we are considering, be given any force whatever. Thus Justice Field, in his dissenting opinion, argued: "The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."<sup>4</sup>

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<sup>4</sup> As illustrative of, and as a partial enumeration of these Federal privileges and im-

The majority of the court were not able to accept this construction of the Amendment which, as we have seen, would have opened such possibilities of increasing the Federal powers at the expense of those of the States. Referring to "the history of the times" in which the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, the court found in them a unity of purpose,—the protection of the freed negroes,—and not an intention radically to alter the constitutional character of the Union. Attention was called to the fact that the Fourteenth Amendment implies and by its language recognizes a continuance of a distinction between Federal and State citizenship, and that from this it follows that the privileges and immunities attaching to or growing out of each are to be distinguished. "Was it the purpose of the Fourteenth Amendment," the court asked, "by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the control of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most

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munities, Justice Bradley quoted the language used by Justice Washington in *Corfield v. Coryell* (4 Wash. C. C. 380) in interpreting the article of the Constitution which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. "The inquiry is," said the justice in that case, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confiding these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relation of the State and Federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by Congress which proposed these Amendments, nor by the legislatures of the States, which ratified them."

**§ 134. Legislative Power Granted Congress by the Fourteenth Amendment.**

From the foregoing cases it appears that the clause of the Fourteenth Amendment which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has not given to the General Government any legislative or even supervisory power which it did not possess before the Fourteenth Amendment was adopted.

In 1875, in pursuance of an authority which it conceived to be granted by the Fourteenth Amendment, Congress passed a so-called Civil Rights Act, fixing generally the penalties to which State officials should be subject for depriving any citizen of the United States of any of the rights secured him by the Thirteenth and Fourteenth Amendments, and declaring specifically that negroes should receive the same treatment at public inns, hotels, railways, theaters, etc., as that enjoyed by white persons. The importance of this act lay in the fact that, by passing it, Congress indicated that it interpreted the Fourteenth Amendment not only as giving it power to punish persons who should deprive others of any of the rights mentioned in that Amendment, but as empowering it to determine specifically what those rights should be. If this were to be accepted as the correct interpretation of the power of Congress under this Amendment, it was clear that the reserved powers of the States would henceforth be at the mercy of the Federal legislative body; for thus the way would be opened to Congress, should it see fit, to convert by its stat-

utes all private rights into Federal rights and as such exclude them from State regulation or violation.

In the Civil Rights cases,<sup>5</sup> decided in 1883, the court laid down, authoritatively and finally, the doctrine that it is not within the legislative power of Congress to define what are the civil rights of individuals, and to affix and enforce penalties for their denial by private persons. Hence the court held unconstitutional and void those portions of the Civil Rights Act of 1875 which attempted to do this. "Individual invasion of individual rights," the court said: "is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or injures them in life, liberty, or property without due process of law, or which denies to them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition.

. . . It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment." The importance of the doctrine declared in the Civil Rights cases is seen when the results that would have followed from a different construction of the Amendment are considered. If the Civil Rights Act had been held appropriate for enforcing the prohibitions of that article it would have been, as the court observes, difficult to set limits to the powers of Congress. With equal authority, that body would have the right to enact a detailed code of laws for the enforcement and protection of all the rights of life, liberty, and property, and itself to prescribe what should constitute due process of law in every possible case.<sup>6</sup>

It was for a long time assumed that the Civil Rights Act of 1875 though

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<sup>5</sup> 109 U. S. 3.

<sup>6</sup> As construed in the Civil Rights cases it is to be noted that the Federal legislative power granted by the Fourteenth Amendment is narrower than that granted by the enforcement clause of the Thirteenth Amendment. This distinction the court in its majority opinion in the Civil Rights cases pointed out in the following language: "This [Thirteenth] Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still legislation may be necessary and power to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."

unconstitutional as applied to the States might be enforced in the District of Columbia and other places subject to the exclusive jurisdiction of Congress. However, in 1913, in *Butts v. Merchants and Miners Transportation Co.*<sup>7</sup> it was held that it was not to be assumed that Congress would have wished that the act should be enforced in such places though unenforceable in the States,—that its intention would appear to have been to have a law that would operate uniformly wherever the jurisdiction of the United States might extend. The court therefore held that, this expectation being defeated, it was not to be assumed that Congress wished that the law should be applied within the special areas subject to its exclusive jurisdiction. In the instant case, therefore, it was held that the invalidity of the Civil Rights Act as applied in the States served also to invalidate it as to other places within the jurisdiction of the United States such as an American vessel upon the high seas more than a league from land and in the District of Columbia and the Territories.<sup>8</sup>

Although by the decisions in the *Slaughter House* and subsequent cases in the Supreme Court, the commands laid upon the States to respect Federal privileges and immunities have thus been shorn of all but declaratory significance, and the general police powers confirmed in the Commonwealths, the other prohibitions of the first section of the Fourteenth Amendment have been so construed by the Supreme Court as to give to the Federal Government a very extensive supervisory jurisdiction over State legislation which it did not possess prior to 1868. Whenever a claim has been made that a State law has worked a deprivation of life, liberty, or property without due process of law, or has resulted in a denial to any person of the equal protection of the laws, the Federal courts have assumed jurisdiction, and, when the claim has been sustained, declared such statutes void. Illustrations of this Federal supervisory power will appear throughout this treatise.

It is true that, in the *Slaughter House* cases, the court declared relative to the clause providing for the equal protection of the laws: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," but this *obiter dictum* has been repeatedly disregarded.

### § 135. Prohibitions of the Fourteenth Amendment Relate Only to State Actions.

It will have been noticed that the doctrine of the Civil Rights cases depended in large measure upon the assertion that the prohibitions of

<sup>7</sup> 230 U. S. 126.

<sup>8</sup> As to the power of Congress to provide for the punishment of individuals interfering with, or conspiring to interfere with the exercise by others of rights created by or dependent upon the Federal Constitution or laws, see *Ex parte Yarbrough* (110 U. S. 651); *U. S. v. Waddell* (112 U. S. 76); *Motes v. U. S.* (178 U. S. 458).



the Fourteenth Amendment were directed exclusively against State acts that is, acts authoritatively sanctioned by the States as such, or officially performed by their agents, and that they had no reference to the acts of private individuals. The doctrine had already been established in a line of cases decided prior to the Civil Rights cases.

In *Strauder v. West Virginia*<sup>9</sup> it was held that a State law which excluded negroes from jury service was unconstitutional as a denial to members of that race of the equal protection of the laws. In *Virginia v. Rives*<sup>10</sup> the question was not as to the existence of a State law excluding negroes from jury service, but as to the administration of a law, not in terms discriminative, in such a way as to exclude negroes from juries. This suit was sought to be removed into the Federal courts under the provision of Section 641 of the Revised Statutes.<sup>11</sup> Without deciding whether or not Congress had, under the enforcement clause of the Fourteenth Amendment, the power to grant relief in cases such as that presented by the petitioner, the Supreme Court held that the suit was not within the terms of the statute.

In *Ex parte Virginia*<sup>12</sup> a somewhat different state of facts was presented. Here there was no State law the constitutionality of which was questioned. A judge of a State court, charged by the law of that State with the duty of selecting jurors was indicted in a Federal court for excluding from the grand and petit jury list a certain individual because of his race or color, in violation of a provision of the act of Congress of 1875. Upon a petition of the accused to the Supreme Court of the United States for a writ of habeas corpus or a writ of certiorari to bring up the record of the lower court in order that he might be dismissed, the Supreme Court denied the writs, holding, in effect, that this act of the judge, involving no necessary exercise of judicial discretion, was committed by him in his official capacity as judge, was an act of the State which he represented, and as such came within the prohibition of the Fourteenth Amendment. The opinion declared: "The prohibitions of the Fourteenth Amendment are addressed to the States. The constitutional Amendment was ordained

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<sup>9</sup> 100 U. S. 313.

<sup>10</sup> 100 U. S. 313.

<sup>11</sup> Sec. 641. "When any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in any part of the State where such prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, . . . such suit or prosecution may, upon the petition of each defendant, filed in said court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next circuit court of the United States to be held in the district where it is pending."

<sup>12</sup> 100 U. S. 339.

for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the act of March 1, 1875, 18 Stat. at L. 336, and we think it was fully authorized by the Constitution. . . . We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from the obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience."<sup>13</sup>

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<sup>13</sup> In this case Justice Field rendered a dissenting opinion, in which he assumed, in the first place, that so much of the Act of 1875 as attempted to regulate the selection of jurors in State courts was unconstitutional and void; in the second place, that the selection of jurors by the judge was a judicial act involving an exercise of discretion and judgment, and, therefore, not subject to enforcement in a particular manner by statute or mandamus, in any event; and, in the third place, that the right to serve as a juror is a political and not a civil right, and therefore not one, the equal enjoyment of which is secured to all by the Fourteenth Amendment. With reference to the purpose for which the war amendments had been adopted Justice Field said: "They do not, in terms, contravene or repeal anything which previously existed in the Constitution and those Amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States; and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a bill of attainder or an *ex post facto* law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. . . . I cannot think I am mistaken in saying that a change so radical in the relation between the Federal and State authorities, as would justify legislation interfering with the independent action of the different departments of the State governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent Amendments. The people, in adopting them, did not suppose that they were altering the fundamental theory of their dual system of governments."

Some commentators have found difficulty in harmonizing the decision in *Ex parte Virginia* with that rendered in *Virginia v. Rives*. Thus, for example, Wise in his *Treatise on American Citizenship*, p. 205, says: "It is impossible to reconcile the decision in *Ex parte Virginia* with the others. . . . As they stand the two cases of *Virginia v. Rives* and *Ex parte Virginia* present an amusing line of demarcation. In *Virginia v. Rives* the misconduct of a sheriff in the method of summoning a jury was declared not to be the action of the State and to be remediable on appeal. In the case of *Ex parte Virginia*, decided on the same day, the misconduct of a judge in not summoning a proper jury was held to be the action of the State, remediable by the indictment of the judge although the State had done no wrong. The only legal principle to be deduced from

These general principles—that the prohibitions of the Amendment are upon the State and not upon individuals; that Congress has no primary and direct legislative authority to define and enforce the rights guaranteed by the Amendment; that the general “police powers” are still possessed by the States;—have not been departed from by the court in subsequent cases.

In *Neal v. Delaware* <sup>14</sup> a motion was sustained to quash an indictment found by a jury from which negroes, in violation of the Fourteenth Amendment, had been excluded, as they had been also from the petit jury which had been summoned to try the case, although the law of the State, as construed by the State courts, did not require or authorize such exclusion.

In *Logan v. United States*,<sup>15</sup> decided in 1892, the court, after a review of previous adjudications, said: “The whole scope and effect of this series of decisions is that, . . . certain fundamental rights, recognized and declared, but not granted or created in some of the Amendments to the Constitution, are thereby guaranteed only against the violation or abridgement by the United States or by the States, as the case may be, and cannot, therefore, be affirmatively enforced by Congress against unlawful acts of individuals.” The court, however, added the cautionary remark that “every right created by, arising under or dependent upon the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution may in its discretion seem most eligible and best adapted to attain the object.”

In *James v. Bowman* <sup>16</sup> the cases were reexamined and the principles declared in them fully approved. And again, in *Raymond v. Chicago Union Traction Co.*,<sup>17</sup> when it was argued that the State authority had disobeyed the authentic commands of the State and that, therefore, its acts could not be deemed those of the State, it was held by the Supreme Court that these acts were nevertheless acts of the State within the in-

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the two decisions is that the boundary line between one officer who is the State and an officer who is not the State, lies somewhere between a sheriff and a judge.”

There is, however, no real incongruity in the cases, and Wise's difficulty arises from an imperfect understanding of the actual point decided in *Virginia v. Rives*. In that case, it was held, as we have seen, simply that the case did not come within the Section 641 of the Revised Statutes, under which removal had been had from the State to the Federal courts. Thus, in effect, all the court decided was, not that Congress had no power under the Fourteenth Amendment to punish or correct such an act as that of the sheriff complained of, but that it had not, in fact, so legislated. In *Ex parte Virginia* the act complained of was construed to be within the scope of the prohibitions of the act of Congress of 1875.

<sup>14</sup> 103 U. S. 370.

<sup>15</sup> 144 U. S. 263.

<sup>16</sup> 190 U. S. 127.

<sup>17</sup> 207 U. S. 20.

tendment of the Fourteenth Amendment, and the statement made that "the immediate and efficient right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exercised without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment."

Finally, in *Home Telephone & Telegraph Co. v. Los Angeles*,<sup>18</sup> after a review of the earlier cases, it was held that the Federal courts might take jurisdiction to enjoin acts under authority of a municipal ordinance passed in virtue of power conferred by the State, on the ground that they were repugnant to the due process clause of the Fourteenth Amendment although they were also unconstitutional as tested by the due process of law provision of the State Constitution. The court said: "The settled construction of the Amendment is that it presupposes the possibility of an abuse by a State officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of State power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. . . .

"That is to say, a State officer cannot, on the one hand, as a means of doing a wrong forbidden by the Amendment, proceed upon the assumption of the possession of State power, and at the same time, for the purpose of avoiding the application of the Amendment, deny the power, and thus accomplish the wrong. To repeat: for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a State officer, in virtue of State power, is doing an act which, if permitted to be done, *prima facie* would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some State authority."<sup>19</sup>

<sup>18</sup> 227 U. S. 278.

<sup>19</sup> For an excellent article showing the extent to which the case of *Home Telephone & Telegraph Co. v. Los Angeles* departed from, without expressly overruling, the earlier cases of *Barney v. City of New York* (193 U. S. 430); *Raymond v. Chicago Union Traction Co.* (207 U. S. 20); and *Siler v. L. & N. R. Co.* (213 U. S. 175), see "The Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials" by S. S. Isseks in 40 *Harvard Law Review*, 969.

In *Tarrance v. Florida* <sup>20</sup> it was declared that "an actual discrimination [by a State officer] is as potential in creating a denial of equality of rights as a discrimination made by law." <sup>21</sup>

By some it has been argued that, under the Fourteenth Amendment, Congress is competent to provide that a penalty shall be imposed upon a State, recoverable by a suit by the United States against the State, for a failure upon the part of the State to give reasonably adequate protection to persons, adequate protection against mob or riotous violence, and also that State officials may be made criminally liable for failure upon their part to give such protection.<sup>22</sup>

### § 136. Summary.

By way of résumé we may say that, as interpreted by the Supreme Court, the adoption of the Fourteenth Amendment has not brought about any fundamental change in our constitutional system. No new subjects have been brought within the sphere of direct control of the Federal Government. No new privileges and immunities of Federal citizenship have been created or recognized. To Congress has been given no new direct primary, legislative power. It has not been authorized by the Amendment to determine and define the privileges and immunities of Federal citizens, nor to define and affirmatively to provide for the protection of the rights of life, liberty, and property, nor by direct legislation to enumerate and describe the privileges which shall constitute the equal protection of the laws. The only legislative power granted to Congress by the Amendment, is the power to provide punishment or relief where the States have deprived individuals or corporations of life, liberty, or property without due process of law, or denied to anyone within their jurisdiction the equal protection of the laws. The supervisory powers of the Federal courts has been enormously increased, since, by the Amendment, they may examine every claim of violations by States of the prohibitions laid upon them by the Amendment, and, where the claim is sustained, grant the necessary relief, either by the issuance of the appropriate writ, or by holding void the offending State laws.

### § 137. Effect of Fourteenth Amendment Upon Rights Enumerated in First Eight Amendments.

In *Ex parte Spies* <sup>23</sup> the point was urged upon the court that the privileges and immunities secured against Federal infringement by the first eight Amendments to the Federal Constitution, were, because so secured,

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<sup>20</sup> 188 U. S. 519.

<sup>21</sup> Cf. *Yick Wo v. Hopkins* (118 U. S. 356).

<sup>22</sup> See the various "Anti-Lynching Bills" which, from time to time have been introduced in Congress. See H. R. Rpt. No. 71, 68th Cong., 1st Sess., and Senate Rpt. 837, 67th Cong., 2d Sess.

<sup>23</sup> 123 U. S. 131.

Federal privileges and immunities, which, according to the Fourteenth Amendment, and the doctrine of the Slaughter House cases the States might not abridge or deny. The counsel for Spies in his argument said: "The position I take is this. Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words while the ten Amendments, as limitations on power, only apply to the Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs as citizens of the United States, and the Fourteenth Amendment as to such rights limits State power as the ten Amendments had limited federal power."

The court, however, found that, in fact, no right of Spies secured by the first eight Amendments had been violated, and that, therefore, it was not necessary to pass upon this constitutional point which his counsel had raised.

In *Maxwell v. Dow*,<sup>24</sup> however, the court found itself compelled to pass specifically upon this point. The court in its majority opinion denied the claim set up, asserting that the mere fact that a certain privilege or immunity was guaranteed against Federal infringement did not operate to make such a privilege or immunity distinctively Federal in character. With reference to the rights enumerated in the first eight Amendments, the court said: "In none are the privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgement by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against the Federal governmental powers. The nature of the character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen."<sup>25</sup>

<sup>24</sup> 176 U. S. 581.

<sup>25</sup> Justice Harlan rendered a dissenting opinion in the course of which he said: "It seems to me that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union,

**§ 138. Federal Privileges and Immunities—Enumeration of.**

With reference to the question that is immediately suggested, as to what are these distinctively Federal rights which the States are not to infringe, the court said in the *Slaughter House* cases: "Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws. One of these is well described in the case of *Crandall v. Nevada*.<sup>26</sup> It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign countries are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.' And, quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the Federal Govern-

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establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, the political community known as the people of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted in the mode prescribed by the Constitution, the first ten Amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified—the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty—could never be impaired or destroyed by the National Government. . . . It does not solve the question before us to say that the first ten Amendments had reference only to the powers of the National Government, and not to the powers of the States. For, if, prior to the adoption of the Fourteenth Amendment, it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime in any court organized or existing under national authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may now be tried in a State court for crime, particularly for an infamous crime, by eight jurors, when that Amendment expressly declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States?'"

Mr. Justice Harlan repeated these views in his dissent to the opinion of the court in *Patterson v. Colorado* (205 U. S. 454).

<sup>26</sup> 6 Wall. 35.

ment was established, we are one people, with one common country, we are all citizens of the United States,' and it is, as such citizens, that their rights are supported by this court in *Crandall v. Nevada*. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as the other citizens of that State. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clause of the Fourteenth, next to be considered."<sup>27</sup>

In *Duncan v. Missouri*<sup>28</sup> it was declared that "The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal Government, and granted or secured by the Constitution."<sup>29</sup>

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<sup>27</sup> Cooley, in his *Principles of Constitutional Law*, p. 245, gives the following enumeration of distinctively Federal rights: "A citizen of the United States," he says, "as such has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are coerced by its law. . . . So every citizen may petition the federal authorities which are set over him in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas, or within the jurisdiction of a foreign government. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship." "One very plain and unquestionable immunity," Cooley adds, "is exemption from any tax burden, or imposition under state laws, as a condition to the enjoyment of any right or privilege under the laws of the United States."

<sup>28</sup> 152 U. S. 377.

<sup>29</sup> Mr. A. J. Lien, in his study "Privileges and Immunities of Citizens of the United States" (Columbia University Studies in History, *Economics and Public Law*, Vol.



### § 139. Suffrage Not a Necessary Incident of Citizenship.

In *Minor v. Happersett*<sup>30</sup> it was held that the suffrage is not a right springing from Federal citizenship. This doctrine was declared in passing upon the claim made in that case by a woman that because of her Federal citizenship she could not constitutionally be disqualified from voting on account of her sex. In passing upon this claim the court admitted that citizenship was not dependent upon sex, but denied that the right of suffrage was necessarily attached to the status of citizenship.<sup>31</sup>

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LIV, p. 80) gives the following list of distinctive Federal privileges or immunities, together with the cases in which they have been declared:

1. The privilege of expatriation: *Talbot v. Janson* (3 Dall. 133); *Murray v. Schooner Charming Betsy* (2 Cr. 64);
2. Protection of the government in foreign countries and on the high seas: *Murray v. The Charming Betsy* (2 Cr. 64); *Neely v. Henkel* (180 U. S. 109);
3. Access to all parts of the Federal Government, and free passage from place to place: *Crandall v. Nevada* (6 Wall. 35);
4. (a) The use of navigable waters,  
(b) The privilege of becoming citizens of the commonwealths through residence: *Dicta* in the *Slaughter-House Cases* (16 Wall. 36);
5. The right peaceably to assemble and petition Congress: *U. S. v. Cruikshank* (92 U. S. 542);
6. Exemption from race-discrimination: *U. S. v. Reese* (92 U. S. 214); *U. S. v. Cruikshank* (92 U. S. 542);
7. The right to exercise freely the privilege of voting for members of Congress and presidential electors: *Ex parte Yarbrough* (110 U. S. 651);
8. The unmolested access to and residence upon a homestead while the requirements for full title are being fulfilled: *U. S. v. Waddell* (112 U. S. 76);
9. Protection from violence while in the custody of the Federal Government: *Logan v. U. S.* (144 U. S. 263);
10. The privilege of informing the government of violations of its laws: *In re Quarles & Butler* (158 U. S. 532);
11. Free migration: *Williams v. Fears* (179 U. S. 270);
12. The right to enter the country, and, if questioned, to prove citizenship: *Chin Yow v. U. S.* (208 U. S. 8).

<sup>30</sup> 21 Wall. 162.

<sup>31</sup> The court said: "Sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption. . . . The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws, and not directly upon the citizen. It is clear, therefore, we think, that the Constitution

### § 140. Nineteenth Amendment.

However, by the Nineteenth Amendment the right of women not to be denied the vote on account of their sex has been made a Federal right.

### § 141. Voting in Primaries.

In *Nixon v. Herndon* <sup>32</sup> it was held that the equal protection clause of the Fourteenth Amendment was violated by a State statute which provided that "in no event shall a negro be eligible to participate in a Democratic primary election held in the State of Texas." "We find it unnecessary to consider the Fifteenth Amendment," said the court, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." The suit was one against the Judges of Election for damages for refusal to allow the plaintiff to vote. To the objection that the subject matter of the suit was political in character, the court said: "Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, <sup>33</sup> and has been recognized by this Court." <sup>34</sup>

In *Love v. Griffith* <sup>35</sup> the court sustained the ruling of a State court that no opportunity existed to grant injunctive relief with reference to the exclusion of a negro from a municipal primary election which had already taken place, the exclusion having been based upon a rule promulgated by the city Democratic committee which was not to be of continuing force but applicable only at the given election. The Supreme Court said that had the question come before it prior to that election it would have presented a grave question of constitutional law.

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has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted." Continuing, the court showed that in no case had the suffrage in the States been considered as co-extensive with citizenship, and concluded: "Certainly, if the courts can consider any question as settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage."

<sup>32</sup> 273 U. S. 536.

<sup>33</sup> 2 *Ld. Raym.* 938; 3 *Ld. Raym.* 320.

<sup>34</sup> *Wiley v. Sinkler* (179 U. S. 58); *Giles v. Harris* (189 U. S. 45).

<sup>35</sup> 266 U. S. 32.

## CHAPTER XII

### INTERSTATE RELATIONS; FULL FAITH AND CREDIT CLAUSE

#### § 142. States Independent of One Another.

In the chapters which have gone before the constitutional relations which exist between the Federal Government upon the one side and the States upon the other side have been considered. In the present and immediately following chapters the relations which exist between the several States will be discussed.

Except as otherwise specifically provided by the Federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand toward one another as independent and wholly separated States. The laws of each State have no force, and its officials have no public authority, outside of the State's territorial boundaries. As to all these matters their relations *inter se* are governed by the general principles of Private International Law or, as otherwise termed, the Conflict of Laws. It may also be said that the territorial character of the quasi-sovereignty of the States is determined by the accepted principles of general public or international law. Thus, as will presently be pointed out, a State of the Union is without the jurisdiction, not because of Federal constitutional limitations, but by reason of the limitations of its territorial sovereignty, as fixed by general Anglo-American jurisprudential principles, to enforce the penal acts of a sovereignty other than its own, to enter personal judgments against persons who have not been personally served within the State,<sup>1</sup> or to determine titles to lands outside the State, or to grant a divorce to non-domiciled petitioners. It thus becomes important to distinguish between the competency of a court to render a judgment, and the competency of a court to enforce a judgment which has been rendered, or a right which has arisen, in another jurisdiction.

During the colonial period the judgments of the courts of the colonies were, as to one another, strictly foreign judgments. That is, they could be impeached for fraud or prejudice, and their merits reexamined. The inconvenience of this state of affairs was soon recognized, and, in the Articles of Confederation, it was provided that "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Article IV, Section 1 of the Federal Constitution provides that "Full faith and credit shall be given in

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<sup>1</sup> As to possible exceptions. See Goodrich, *Conflict of Laws* §§ 73-74.

each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." The important difference between this provision and the corresponding one in the Articles of Confederation is that the Congress is given authority to fix by statute the manner in which these acts, records, and proceedings shall be proved and to determine the effect that shall be given them when thus proved.

### § 143. Congressional Legislation.

By a law passed in 1790 Congress provided: "That the acts of the legislature of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." <sup>1a</sup>

In 1804 this act was supplemented by one which, after providing for the authentication of other than judicial records, declared, in its second section: "And be it further enacted, that all the provisions of this act, and the act to which this is a supplement [Act of 1790] shall apply as well as to the public acts, records, office books, judicial proceedings, courts, and offices of the respective Territories of the United States and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and officers of the several States." <sup>2</sup>

In *Mills v. Duryee* <sup>3</sup> decided in 1813, the Supreme Court, construing these acts, held that by them Congress had not only provided for the admission of authenticated judgments of a State as evidence in the courts of the other States in the Union, but that it had, in execution of the constitutional provision, declared that they should be conclusive evidence of all matters properly adjudicated therein.

"The effect of this clause is to put the judgment of the court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of the conclusiveness as to the facts adjudged. But for this provision, such State judgments would stand upon the footing of foreign judgments, which are examinable

<sup>1a</sup> 1 U. S. Stat. at L. 122.

<sup>2</sup> 2 U. S. Stat. at L. 298. These two sections are united in Sections 905 and 906 of the Revised Statutes. Act of Jan. 2, Chap. 23 (28 Stat. at L. 601).

<sup>3</sup> 7 Cr. 481.

when sued on in the courts of another country, being only prima facie evidence of the matters adjudged." <sup>4</sup>

"Judgments recovered in one State of the Union, when proved in the courts of another, differ from the judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." <sup>5</sup>

#### § 144. Limitations, Statutes of.

It is established that the statute of limitations of the State where enforcement is sought may be filed in bar to a suit upon a judgment of a sister State. In other words, such a plea is to the remedy and not the rights that are involved.<sup>6</sup> However, in *Christmas v. Russell*,<sup>7</sup> the court held unconstitutional a Mississippi law which declared that a judgment recovered in other States against citizens of Mississippi should not be enforced in the courts of that State if the cause of action which was the foundation of the judgment would have been barred in the Mississippi courts by the Statute of Limitations of Mississippi. This statute, the court declared, was not a Statute of Limitations in any sense known to the law, but was an attempt to give operation to the Mississippi statute in all the other States of the Union.<sup>8</sup>

#### § 145. Full Faith and Credit Clause Does Not Apply to Courts of the Territories and the District of Columbia.

This full faith and credit clause, it is to be observed, has reference only to the States, and not to the Territories or to the District of Columbia. Therefore it has been decided that the acts of Congress, in as far as they have reference to the Territories and to the District of Columbia, rest, for their constitutionality, upon other clauses of the Constitution. In *Embry v. Palmer* <sup>9</sup> the court said: "So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on Article IV, Section 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what

<sup>4</sup> *Bigelow v. Old Dominion Copper Mining Co.* (225 U. S. 111). See also *D'Arcy v. Ketchum* (11 How. 165).

<sup>5</sup> *Hanley v. Donoghue* (116 U. S. 1). Citing *Buckner v. Finley* (2 Pet. 592); *M'Elmoyle v. Cohen* (13 Pet. 312); *D'Arcy v. Ketchum* (11 How. 165); *Christmas v. Russell* (5 Wall. 290); *Thompson v. Whitman* (18 Wall. 457).

<sup>6</sup> *M'Elmoyle v. Cohen* (13 Pet. 312). In *Bacon v. Howard* (20 How. 22), the court said: "There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits."

<sup>7</sup> 5 Wall. 290.

<sup>8</sup> As to this case, see § 151.

<sup>9</sup> 197 U. S. 3.

effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the District. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced."

The same reasoning that in *Embry v. Palmer* supports the power of Congress to give to judgments rendered by the courts of the District of Columbia full force and credit in the States, is sufficient to support its power to give equal force in the States to judgments rendered in the Territories and insular possessions of the United States, and *vice versa* as to State judgments sued upon in the Territories or in the insular possessions.<sup>10</sup>

#### § 146. Federal Judgments and Decrees.

In numerous cases it has been held that full faith and credit is to be given to judgments of Federal courts obtained in one State or Territory when sought to be enforced in the courts of another State or Territory, or the District of Columbia. This is due to the fact that, as the Supreme Court say in *Clafin v. Houseman*,<sup>11</sup> "The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, a paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kinds of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be

<sup>10</sup> "This language [of the Court in *Embry v. Palmer*] is equally applicable to legislative acts of the territory." *Atch., T. & S. F. R. Co. v. Sowers* (213 U. S. 55). Citing *New Mexico v. Denner & R. G. R. Co.* (203 U. S. 38).

<sup>11</sup> 93 U. S. 130.

prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction."

It scarcely needs be said that the judgments of Federal courts, sitting in one State of the Union, will be given full faith and credit in Federal courts sitting in another State. "Undoubtedly," said the Supreme Court in *Cooper v. Newall*,<sup>12</sup> "the judgment of the courts of the United States are domestic judgments of the Nation." Being domestic judgments, the judgments and decrees of Federal courts sitting in a State or Territory will be given full faith and credit in the courts of that State or Territory.<sup>13</sup> This is required independently of the full faith and credit clause,—such judgments or decrees create Federal rights which the State authorities may not disregard, and whether they have been disregarded is itself a Federal question. In *Crescent City Live-Stock Co. v. Butchers' Union*,<sup>14</sup> the court said: "The question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process. . . . It may be conceded . . . that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a State tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."

#### § 147. Public Acts.

The term Public Acts as used in the full faith and credit clause has not been defined by the Supreme Court, but it has been assumed by the courts that it refers to the legislative acts and Constitutions of the States. As to these Public Acts the clause operates to require that they shall be given the same effect by the courts of the other States as they have by law and usage at home.<sup>15</sup> However, it is well settled that the mere construction by a State court of a statute of another State, without questioning its validity, does not deny to the statute the faith and credit constitutionally due it.<sup>16</sup> If the constitutional provision or statute has been construed by

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<sup>12</sup> 173 U. S. 555.

<sup>13</sup> *Dupasseur v. Rocheneau* (21 Wall. 130).

<sup>14</sup> 120 U. S. 141.

<sup>15</sup> *Chicago & Alton R. Co. v. Wiggins Ferry Co.* (119 U. S. 615).

<sup>16</sup> *Glenn v. Garth* (147 U. S. 360); *Lloyd v. Matthews* (155 U. S. 222); *Allen v. Allegheny Co.* (196 U. S. 458); *Smithsonian Institution v. St. John* (214 U. S. 19).

the highest court of the enacting State, that construction will, ordinarily, but not necessarily, be followed by the courts of another State. For the doctrine seems well established that the requirements of the full faith and credit Clause have been satisfied when the validity of the public act has been accepted by the court of another State in which its existence has been duly proved according to the method prescribed by Congress.

No question with regard to the application of the full faith and credit Clause arises where, in a State court, the validity of a legislative act of another State is not in question, and the controversy turns merely upon its interpretation.<sup>17</sup>

Mere error in construing a statute of another State will not furnish a basis for a claim that full faith and credit has been denied to such statutes.<sup>18</sup>

The full faith and credit clause places no obligation upon the courts of the States to keep their decisions in conformity with the principles of the "general law of the land," that is, independently of the particular jurisprudence of a particular State in whose courts a judgment has been obtained.<sup>19</sup>

"The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial."<sup>20</sup>

In *Hartford Life Insurance Co. v. Barber*<sup>21</sup> it appeared that, by the decree of a Connecticut court, a life insurance company of that State had been declared competent to do certain things. A Missouri court, in another case, with reference to rights and obligations arising under the exercise by the company of the powers which the Connecticut court had declared it to possess, declared that the company had no such powers. Upon error, the Federal Supreme Court held that the powers given by the Connecticut charter were entitled to the same credit elsewhere as the judgment of the Connecticut court,<sup>22</sup> and that full faith and credit had not been given by the Missouri court to the Connecticut record.

"Whenever it becomes necessary under this requirement of the Constitution for a court of one State in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court

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<sup>17</sup> *Western Life Indemnity Co. v. Rupp* (235 U. S. 261), and cases therein cited.

<sup>18</sup> See *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.* (243 U. S. 93), and cases therein cited.

<sup>19</sup> *Chicago & Alton R. Co. v. Wiggins Ferry Co.* (119 U. S. 615), and cases therein cited.

<sup>20</sup> *Finney v. Grey* (189 U. S. 335).

<sup>21</sup> 245 U. S. 146.

<sup>22</sup> Citing *Royal Arcanum v. Green* (237 U. S. 531).



matters of fact, which, like other facts, must be proved before they can be acted upon. This [Supreme] court, and other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States, but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley v. Donoghue*, 116 U. S. 1.”<sup>23</sup>

**§ 148. Full Faith and Credit Clause Applies Only to Civil Judgments.**

It is established that the full faith and credit clause does not obligate the courts of one State to enforce the penal judgments and decrees of the courts of another State. This results from the fact that, according to the generally accepted doctrines of public law which determine territorial jurisdiction, one sovereignty is, by its inherent nature, without jurisdiction to enforce the penal acts or decrees of another sovereignty. As to civil acts and decrees there is no such incompetence, but no obligation of enforcement save that of international comity, or, in the case of the States of the American Union, that imposed by the full faith and credit clause of the Federal Constitution.

The foregoing doctrines were first declared by the Supreme Court in *Wisconsin v. Pelican Insurance Co.*<sup>24</sup> In that case an original suit had been brought by the State of Wisconsin in the Supreme Court of the United States upon a judgment obtained in its own courts against an insurance company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioners of the State. The Federal court held that the grant to it of original jurisdiction in suits between a State and citizens of another State, though given in general terms, was not to be construed to extend to actions brought by a State to enforce even indirectly in another jurisdiction a provision of its own penal law. The court said: “The grant is of ‘judicial power,’ and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. . . . The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.”

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<sup>23</sup> *Chicago & Alton R. Co. v. Wiggins Ferry Co.* (119 U. S. 615).

<sup>24</sup> 127 U. S. 265.

The application of the foregoing rule, the court went on to say, is not affected by the full faith and credit clause. That clause, and the acts of Congress under it, the court declared, establish a rule of evidence rather than of jurisdiction. "While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or National, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for a fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. In the words of Justice Story, . . . 'the Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.'" <sup>25</sup>

#### § 149. Penal Laws and Judgments Defined.

In *Huntington v. Attrill* <sup>26</sup> the question as to the distinction between civil and penal causes was examined with especial care. The question was as to whether, under the full faith and credit clause, the courts of Maryland were obligated to enforce a judgment recovered in a New York court against officers of a corporation, by a creditor thereof for making a false certificate of the amount of capital stock paid in under a law of New York which made such officers, under such circumstances, liable for the debts of the corporation. Such a judgment the Supreme Court held not to be penal in character, and, therefore, that the courts of other States were called upon to enforce it. The court said: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has

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<sup>25</sup> There are some early cases in which State courts gave effect to penal judgments e. g., *Spencer v. Brockway* (1 Ohio, 259); *Healy v. Root* (11 Pick. 389); *Indiana v. Hilmer* (21 Ia. 370). These cases are now of no authority.

<sup>26</sup> 146 U. S. 657.

been pointed out that neither the liability imposed nor the remedy given is strictly penal."

This case made more plain than had previously been shown in *Wisconsin v. Pelican Insurance Co.*<sup>27</sup> that, according to general or international jurisprudence, as it existed at the time the Constitution was adopted, and has since existed, no State, by reason of international comity or otherwise, deems it proper, or itself competent, to lend its aid, directly or indirectly, for the enforcement of the penal laws or judgments of another State,<sup>28</sup> and, therefore, that the obligation of the full faith and credit clause of the Federal Constitution cannot have been intended to place the States of the Union under any obligation with reference to penal laws or judgments founded thereon: in other words, that the only purpose of the clause is to make constitutionally obligatory that respect which, according to the accepted doctrines of conflict of laws, the States of the world are accustomed to pay to the public acts and records of each other.<sup>29</sup> To hold otherwise, the court said would in effect be to vest the courts of the States with a jurisdiction and to compel them to exercise it, which, according to settled principles of general public law the courts of the several sovereignties of the world are deemed to be without, or, at any rate, under no obligation of international comity to exercise.

Referring to the full faith and credit clause of the Constitution and to provisions of Congress as contained in Section 905 of the Revised Statutes the court said: "These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject matter or of the parties.<sup>30</sup> And they confer no new jurisdiction on the courts of any State, and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred."

Upon similar grounds it has been held that the courts of a State of the Union cannot be compelled to take jurisdiction of a suit to recover penalties for the violation of laws of the United States.<sup>31</sup>

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<sup>27</sup> 127 U. S. 265.

<sup>28</sup> Even the matter of the extradition of fugitives from justice has to be arranged for by special treaties.

<sup>29</sup> *Cf.* § 142.

<sup>30</sup> Citing *D'Arcy v. Ketchum* (11 How. 165); *Thompson v. Whitman* (18 Wall. 457).

<sup>31</sup> *Martin v. Hunters Lessee* (1 Wh. 304); *United States v. Lathrop* (17 Johns. 4). In *Chaplin v. Houseman* (93 U. S. 130), it was urged that judgments of the Federal courts, even in criminal cases, should be given full faith and credit in the State courts because Federal laws were to be considered as, in effect, laws of each of the several States, but the court, speaking through Mr. Justice Bradley, said: "It would be a manifest incon-

So, also, it is established, that the Federal courts, except in cases removed into them from State courts, in order to protect rights under the Constitution and laws of the United States, cannot entertain jurisdiction of suits to enforce criminal laws of the States, or to recover penalties imposed by way of punishment for the violation of laws of the States.<sup>32</sup>

As being simply evidence, judgments of the courts of one State, when sued upon in another State, are subject, as regards procedure and remedies, to the law of the latter State. For example, the statute of limitations of the State where suit is brought is applied even though it provides a shorter term of years than that existing in the State in which the judgment was originally obtained.<sup>33</sup>

Whether or not a judgment the enforcement of which is sought in a State other than the one in which it was originally rendered is penal or civil in character is a matter to be decided in the first place by the court in which enforcement is sought, and finally upon writ of error, by the Supreme Court. As that court said, in *Huntington v. Attrill*:<sup>34</sup> "If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is.<sup>35</sup> So if the State court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the State court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith

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gruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty." See also *Re Loney* (134 U. S. 372).

<sup>32</sup> *Gwin v. Breedlove* (2 How. 29); *Gwin v. Barton* (6 How. 7); *Dey v. Chicago, M. and St. P. R. Co.* (45 Fed. Rep. 82).

<sup>33</sup> *M'Elmoyle v. Cohen* (13 Pet. 312); *Bacon v. Howard* (20 How. 22).

<sup>34</sup> 146 U. S. 657.

<sup>35</sup> Citing *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.* (125 U. S. 18).

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<sup>27</sup> 127 U. S. 265.

<sup>28</sup> Even the matter of the extradition of fugitives from justice has to be arranged for by special treaties.

<sup>29</sup> Cf. § 142.

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<sup>31</sup> *Martin v. Hunters Lessee* (1 Wh. 304); *United States v. Lathrop* (17 Johns. 4). In *Chaplin v. Houseman* (93 U. S. 130), it was urged that judgments of the Federal courts, even in criminal cases, should be given full faith and credit in the State courts because Federal laws were to be considered as, in effect, laws of each of the several States, but the court, speaking through Mr. Justice Bradley, said: "It would be a manifest incon-

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Whether or not a judgment the enforcement of which is sought in a State other than the one in which it was originally rendered is penal or civil in character is a matter to be decided in the first place by the court in which enforcement is sought, and finally upon writ of error, by the Supreme Court. As that court said, in *Huntington v. Attrill*:<sup>34</sup> "If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is.<sup>35</sup> So if the State court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the State court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith

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gruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty." See also *Re Loney* (134 U. S. 372).

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<sup>34</sup> 146 U. S. 657.

<sup>35</sup> Citing *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.* (125 U. S. 18).

and credit have been given to that judgment, must decide for itself the nature of the original liability."

**§ 150. Local Policy of States Where Enforcement Is Sought.**

As between independent and sovereign States international comity does not obligate one State to give faith and credit to the judgments and decrees of tribunals of other States founded upon laws, customary or statutory, which are in conflict with its own public policy. There have been some cases in which State courts have held that this doctrine has not been disturbed (as between the States of the American Union) by the full faith and credit clause of the Federal Constitution, but it is clear that this holding is not a correct one and finds no support in the decisions of the United States Supreme Court. It is true that it is optional with each State whether it will enforce in its courts statutory civil rights accruing under the laws of the other States, but, when a court of competent jurisdiction has rendered a judgment based upon such rights, and suit is brought upon that judgment in the courts of another State, there remains no option as to giving to that judgment full faith and credit. In other words, those courts cannot go back of the judgment in order to determine whether the law upon which it was founded was in consonance with the policy of the State where enforcement is sought, in order to refuse enforcement if it be found that there is not such a consonance. *Fauntleroy v. Lum* <sup>36</sup> and *Converse v. Hamilton* <sup>37</sup> would seem to be decisive as to this, and as repudiating *dicta* to the contrary in *Ferry v. Guy* <sup>38</sup> and *Allen v. Alleghany Co.* <sup>39</sup>

Reversing the decision of a Wisconsin court, the Supreme Court in *Converse v. Hamilton* said: "The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution." In this case demurrers had been filed, and sustained by the Wisconsin court, upon the ground that to permit the action to be maintained would be contrary to the enforcement of the double liability of stockholders of insolvent corporations.

In *Hancock National Bank v. Farnum* <sup>40</sup> with reference to a similar question of the double liability of stockholders, the Supreme Court of Rhode Island had treated the right to maintain the action as one of comity only, and, finding that the right with which the judgment creditor was invested under the law of Kansas was unlike that conferred by the law of Rhode Island, had ruled that the action could not be maintained. Reversing this ruling, the United States Supreme Court said: "The question to be determined in this case was not what credit and effect are given in an action

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<sup>36</sup> 210 U. S. 230.

<sup>37</sup> 224 U. S. 243.

<sup>40</sup> 176 U. S. 640.

<sup>38</sup> 189 U. S. 335.

<sup>39</sup> 196 U. S. 458.

against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured."<sup>41</sup>

**§ 151. Failure of the States to Provide Courts with Jurisdiction to Entertain Suits for the Enforcement of Foreign Judgments or Decrees.**

Under a number of differing circumstances the question has been raised as to whether the obligation of the full faith and credit clause has been violated when the courts of one State have declared themselves, by reason of the statute law of their own State, to be without jurisdiction or authority to enforce the judgments or decrees of the courts, or the rights accruing under the laws of another State.

In *Christmas v. Russell*<sup>42</sup> the court held unconstitutional and void a statute of the State of Mississippi which declared that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought."

In the instant case a judgment had been recovered in the Kentucky courts against a domiciled citizen of Mississippi, upon a promissory note, suit upon which was not barred by the statute of limitations of Kentucky, but which would have been barred by the Mississippi statute. Suit upon this judgment was instituted in the Federal Circuit Court for the Southern District of Mississippi. To the plea that the suit was barred by the Mississippi statute, the Circuit Court held, and, in that holding was sustained by the Supreme Court, that the statute was void. The Supreme Court said: "It is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the State, and it was undoubtedly correct; and if so, it is not competent for any other State to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the State courts from which it was taken."

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<sup>41</sup> See also *Roche v. McDonald* (275 U. S. 449).

<sup>42</sup> 5 Wall. 290.



In *Anglo-American Provision Co. v. Davis Provision Co.*,<sup>43</sup> however, the court upheld an act of the State of New York which, as construed by the New York courts, precluded the maintenance of an action by them on an Illinois judgment by one foreign corporation against another foreign corporation. The court admitted that the precise point involved in this case had not been previously passed upon, but pointed to the declaration of the court in *Wisconsin v. Pelican Insurance Co.*<sup>44</sup> that the full faith and credit clause of the Constitution, together with the legislation of Congress thereunder, had established a rule of evidence rather than of jurisdiction, and continued: "The Constitution does not require the State of New York to give jurisdiction to the Supreme Court [of the State] against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of which Congress has passed. But the Constitution does not require the State to provide such a court."<sup>45</sup> If the State does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other States of the Union also would have a right to resort to it in cases of the same class.<sup>46</sup> But this right, even when the suit was upon a judgment of another State, would not rest on the first section of Article IV, on which alone the plaintiff relies or can rely, but would depend on the second section, entitling the citizens of each State to all privileges and immunities of citizens in the several States." As to the statute held void in the case of *Christmas v. Russell*,<sup>47</sup> the court said: "There was no suggestion that the statute went to the jurisdiction of the court. . . . Indeed the suit was brought in the United States circuit court. The statute made no discrimination in the right to come into court, according to the character of the plaintiff or of the cause of action, but attempted to create a defense against a plaintiff assumed to have a right to come into the court and to invoke the jurisdiction."

It cannot be denied that this decision tended to weaken the force of the full faith and credit obligation placed upon the States by opening to them a way in which they could escape from its operation by providing by their laws that their court should not have jurisdiction in certain classes of cases. It is, however, to be observed that the statute in this case was not directed expressly or exclusively against judgments obtained in the courts of other States, but was general in its operation, that is, denying jurisdiction of all suits against a foreign corporation, by another foreign corporation or a non-resident of the State, and upon causes of action arising without the State.

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<sup>43</sup> 191 U. S. 373.

<sup>44</sup> 127 U. S. 265.

<sup>45</sup> Citing *Missouri v. Lewis* (sub. nom. *Bowman v. Lewis*) [101 U. S. 22].

<sup>46</sup> Citing *Blake v. McClung* (172 U. S. 239).

<sup>47</sup> 5 Wall. 290.

The distinction between such a law, which the court declared to be one of jurisdiction only, and one which would seek to authorize the courts of the enacting State to examine into its merits of a judgment obtained in the courts of another State for the purpose of determining whether or not it should be enforced, and which would clearly be a violation of the full faith and credit clause, the court, in *Fauntleroy v. Lum*,<sup>48</sup> admitted might sometimes be difficult to draw. But the distinction itself, the court said, is plain. "One goes to the power, the other only to the duty of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reserved. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense." The statute in the *Anglo-American Provision Co.* case, the court declared, was plainly one dealing with the authority and jurisdiction of the New York court.

In *Fauntleroy v. Lum*, the plaintiff, a citizen of Mississippi, obtained in Missouri a judgment against another citizen of Mississippi upon whom personal service had been obtained while he was temporarily in Missouri, in a suit brought upon a contract in cotton futures entered into in Mississippi in which State such futures were prohibited by law. The case finally reaching the Federal Supreme Court upon error to the Supreme Court of Mississippi which, in a suit upon the Missouri judgment had refused to give effect to that judgment, the Supreme Court held that, the Missouri court having had full jurisdiction to render a personal judgment against the defendant, the full faith and credit clause obligated the courts of Mississippi to give to the judgment full faith and credit. The statute of Mississippi making dealing in futures a misdemeanor the Supreme Court declared to be one laying down a rule of decision and could not constitutionally be relied upon by the Mississippi courts as a means of escaping from the obligation to give full faith and credit to a judgment of a court of another State. The fact that the cause of action upon which the Missouri judgment was rendered arose in Mississippi, and out of a gambling transaction which the laws of Mississippi declared to be a misdemeanor, the Supreme Court declared immaterial, for the merits of the judgment could not be inquired into. The court admitted that, in the opinion rendered in *Wisconsin v. Pelican Insurance Co.*, language had been used which might be held to imply a right of the court in which the enforcement of a judgment of a court of another State is sought, to examine into the original basis of the judgment, but, it was declared, these words were *obiter* and the doctrine

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<sup>48</sup> 210 U. S. 230.

of that case should be held down to the precise point that was therein decided.<sup>49</sup>

The doctrine of *Fauntleroy v. Lum* has never been overruled, and in result it may be said to be established that though a State may, so far as the full faith and credit clause of the Federal Constitution is concerned, determine what facts shall be sufficient to support causes of action in its own courts, and thus, for example, may deny to its courts the jurisdiction to entertain suits based upon torts committed outside the State, it may not by statute disqualify its courts, nor may the courts, with or without express statutory direction, refuse enforcement to judgments obtained in the courts of other States and valid in those States, even though such judgments may have been founded upon facts or actions which would not be sufficient to support a judgment in the courts of the State in which enforcement is sought. As Chief Justice Marshall said in the early case of *Hampton v. M'Connel*,<sup>50</sup> and as expressly approved in *Fauntleroy v. Lum*, "the judgment of a State court should have the same credit, validity, and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States."

In *Kenney v. Supreme Lodge of the World*<sup>51</sup> it was held that the obligation of the full faith and credit clause was violated by a State statute, prohibiting actions for death occurring in other States and construed as denying to the courts of the State jurisdiction of an action on a judgment obtained in another State on a cause of action for death. The court below, dismissing the suit, relied upon what it conceived to be the doctrine of the Federal Supreme Court in *Anglo-American Provision Co. v. Davis Provision Co.*<sup>52</sup> and certain language of the opinion in *Wisconsin v. Pelican Insurance Co.*<sup>53</sup> In the instant case, however, the court said, that those cases had been misconstrued. The *Anglo-American Provision Co.* case, the court said, is sufficiently explained by the views regarding foreign corporations that have prevailed since the case of *Bank of Augusta v. Earle*.<sup>54</sup> The court added: "No doubt there is truth in the proposition

<sup>49</sup> To four of the justices of the court this holding of the court seemed unnecessary and unduly restrictive, in its effect, of the legitimate police powers of the States. In their dissent, these justices said: "The doctrine now upheld comes to this,—that no State, generally speaking, possesses police power concerning acts done within its borders if any of the results of such acts may be the subject of civil actions, since the enforcement by the State of its police regulations as to such acts may be nullified by an exertion of the judicial power of another State."

<sup>50</sup> 3 Wh. 234.

<sup>51</sup> 252 U. S. 411.

<sup>52</sup> 191 U. S. 375.

<sup>53</sup> 127 U. S. 265.

<sup>54</sup> 13 Pet. 579.

that the Constitution does not require the State to furnish a court. But it is also true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect. . . . It is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent. The assumption that it could not do so was the basis of the decision in *International Text Book Co. v. Pigg*,<sup>55</sup> and the same principle was foreshadowed in *General Oil Co. v. Crain*,<sup>56</sup> and in *Fauntleroy v. Lum*.<sup>57</sup>

#### § 152. *Nul Tiel Record.*

In the immediately preceding sections the competency of the enforcing court has been considered. In this section will be considered the competency of the court rendering the judgment or issuing the decree which the courts of other States are called upon to enforce.

It is clear that the courts of one State are not expected to enforce judgments, decrees, or laws which are not valid in the States in which they are rendered or enacted. In other words, the validity of all judgments or decrees is dependent upon the court which renders them having jurisdiction in the premises.

"The faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind persons against whom the judgment is sought to be enforced."<sup>58</sup>

Whether or not the court in which the judgment was originally obtained, had obtained jurisdiction is to be determined by the court in which enforcement of the judgment is sought according to generally accepted principles of jurisprudence. As the court says in *Bigelow v. Old Dominion Copper Mining Co.*,<sup>59</sup> "This requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice, protected by other constitutional provisions which it was never intended to modify or override." In the same case, referring to the holding in *Thompson v. Whitman*,<sup>60</sup> the court said: "That case has since been accepted as determining that the binding effect of a judgment of one State,

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<sup>55</sup> 217 U. S. 91. In this case it was held, *inter alia*, that a State might not deny to corporations engaged in interstate commerce and doing business within the State the right to maintain an action in the courts of the State unless it had previously conformed to certain requirements fixed by the statute law of the State.

<sup>56</sup> 205 U. S. 211.

<sup>57</sup> 210 U. S. 230.

<sup>58</sup> *Bigelow v. Old Dominion Copper Mining Co.* (225 U. S. 111). See also *D'Arcy v. Ketchum* (11 How. 165); *Public Works v. Columbia College* (17 Wall. 521); *Thompson v. Whitman* (18 Wall. 457); *Hanley v. Donoghue* (116 U. S. 1); *Huntington v. Atreill* (146 U. S. 657); *Hall v. Lanning* (91 U. S. 160).

<sup>59</sup> 225 U. S. 111.

<sup>60</sup> 18 Wall. 457.

when pleaded as an estoppel in the courts of another, is open to challenge by assailing an officer's return of service,<sup>61</sup> or the authority of one who assumed to accept service, or to enter an appearance, even though the judgment includes a finding of facts necessary to confer jurisdiction."

In *Goldey v. Morning News*,<sup>62</sup> the court said: "It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."

### § 153. Judgments in Rem and in Personam.

The validity of judgments or decrees in States other than those in which they are obtained depends upon the court which rendered them having obtained jurisdiction. In order to obtain jurisdiction in actions *in rem*, the *res* must be located in the State. In all actions service of notice of the commencement of the suit must be had upon the defendants. In actions *in rem* this service need not be actual, but may be constructive, that is, by publication. In actions *in personam*, however, actual service is required. Mere constructive service will not warrant a personal judgment or decree which may be sued upon in another jurisdiction. This doctrine was carefully laid down in *Pennoyer v. Neff*.<sup>63</sup> In its opinion in this case the court said: "It is in virtue of the State's jurisdiction over the property of the non-residents situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate.

. . . Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him; such a judgment must, upon general principles, be deemed to bind him only to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*,

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<sup>61</sup> But see *Miedrich v. Lauenstein*, 232 U. S. 236, and note in 28 *Yale Law Journal* 578.

<sup>62</sup> 156 U. S. 518.

<sup>63</sup> 95 U. S. 714.

for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*."

In *Bigelow v. Old Dominion Copper Mining Co.*<sup>64</sup> it was held that a decree of a Federal Circuit court, sitting in New York, having jurisdiction of the case because of the diversity of citizenship of the parties, and, therefore, called upon to apply the law of the State of New York, dismissing a suit *in personam* against one of two joint tortfeasors was not denied credit by the refusal of a Massachusetts court to allow the decree to operate as a bar to a suit upon the same facts against the other of the tortfeasors, who was not a resident of the State of New York, and had not been made a party to the suit in the Federal court, such refusal being based upon the ground that, under general law, which might or might not be the local law of New York, the relation between two joint tortfeasors was not such as to make the one not sued a party either by privity or representation. The Massachusetts court, the Supreme Court said, was at liberty to decide this matter for itself.

Substantially similar was the holding of the court in *D'Arcy v. Ketchum*<sup>65</sup> and *Public Works v. Columbia College*.<sup>66</sup> In this latter case the court said: "It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that State without service of process upon him or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the State where rendered. Their effects are merely local. Out of the State they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the State courts.

"The judgment in New York, it is true, is a joint judgment against all the partners, against those summoned by publication as well as those who were served with process or appeared; but this joint character cannot affect the question of its validity as respects those not served. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

The inability of the courts of one State to affect by their judgments or decisions property having its legal situs in another State is illustrated in the case of *Fall v. Eastin*,<sup>67</sup> in which it was held that a deed to a piece of land located in Nebraska made by a commissioner in the State of Washington under the order of a court of that State need not, under the full

<sup>64</sup> 225 U. S. 111.

<sup>65</sup> 11 How. 165.

<sup>66</sup> 17 Wall. 521.

<sup>67</sup> 215 U. S. 1.

faith and credit clause, be recognized in the former State. The court pointed out that had the plaintiff in error obeyed the order of the Washington court and made, as directed, a deed of conveyance, that conveyance would have received recognition in the Nebraska courts. But he having refused to do this, and the deed having been made by a commissioner, the conveyance was to be considered as a part of the proceedings in the court which ordered it, which court was without power to affect the title of real property not within the State. As to this the court quoted from *Watkins v. Holman*, where it was said: "A court of chancery, acting *in personam* may well declare the conveyance of land in any other State, and may enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom title is vested, can operate beyond the jurisdiction of the court."

It has been held that the "full faith and credit clause does not operate to give effect in another State to a State statute exempting from taxation the evidence of the State debt so as to defeat the collection of a tax levied by that other State upon portions of the debt held by persons there residing. This was decided by *Bonaparte v. Tax Court*,<sup>68</sup> the court saying: "It is insisted . . . that the immunity asked for arises from Art. IV, Sec. 1, of the Constitution. . . . We are unable to give such an effect to this provision. No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular. . . . The debt was registered, but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was 'movable' like other debts, and had none of the attributes of 'immovability.' The owner may be compelled to go to the debtor State to get what is owing to him, but that does not affect his citizenship or his domicile. The debtor State is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the State in which he dwells, still remain, and as a member of society he must contribute his just share toward supporting the government whose protection he claims and to whose control he has submitted himself."

**§ 154. The States May, as a Matter of Comity, Enforce in Their Own Courts Rights Accruing Solely under the Statute Laws of Other States, But Are Not Obligated So to Do.**

It has been held in numerous cases that each State of the Union, though not compelled to do so by the full faith and credit clause of the Constitu-

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<sup>68</sup> 104 U. S. 592.



tion, may, as a matter of comity, enforce in its own courts, which have jurisdiction of the parties and subject-matters, civil rights of actions depending solely upon the statutes of another State. Thus in *Dennick v. Central R. R. Co.*<sup>69</sup> with reference to a suit for damages brought in New York under an act of New Jersey, the court said: "It is scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."<sup>70</sup>

In *Slater v. Mexican National R. R. Co.*,<sup>71</sup> applying the same doctrine, the court said: "When such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori* with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio* which, like other obligations, follows the person and may be enforced wherever the person may be found."

In this case the court went on to declare, however, that if the only source of obligation be the law of the place of the act, that law determines not merely the existence of the obligation, but its extent. "It seems to us unjust," the court said, "to allow the plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

This doctrine was again affirmed and applied in *Atchison, etc., R. Co. v. Sowers*.<sup>72</sup>

<sup>69</sup> 103 U. S. 11.

<sup>70</sup> See also *Stewart v. B. & O. R. Co.* (168 U. S. 445).

<sup>71</sup> 194 U. S. 120.

<sup>72</sup> 213 U. S. 55.



To what extent the courts of one State will permit civil action to be maintained upon transactions accruing in another State, and even such as are in contravention of the statutes of that State, is a matter for those courts themselves to decide. The full faith and credit clause of the Federal Constitution has no application in such cases. Thus in *Allen v. Alleghany Co.*<sup>73</sup> it was held that no Federal question was raised by the holding of the New Jersey court that an action could be maintained upon a contract executed in the State of New York by a corporation foreign to that State, which contract was in contravention of the statutes of that State and not enforceable in its courts.

### § 155. Marriage and Divorce.

The force and meaning of the "full faith and credit" clause of the Constitution has been especially developed in connection with the subject of marriage and divorce and it will, therefore, be proper to state briefly the positions that the Supreme Court has taken upon this important point.

Generally speaking, it has been held in the United States that jurisdiction to grant a divorce depends upon the domicile of the parties. With few exceptions, all of the States of the Union recognize the possibility of the wife obtaining for the purpose of divorce or separate maintenance a domicile separate from that of her husband. Until recently, however, a few States (among them New York) held that where the husband and wife were domiciled in different States, decrees of divorce granted in either State need not be given full faith and credit in the other States. The unconstitutionality of this doctrine was, however, declared by the United States Supreme Court in *Atherton v. Atherton*.<sup>74</sup>

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<sup>73</sup> 196 U. S. 458.

<sup>74</sup> 181 U. S. 155.

In all European countries, and in Spanish America, the possibility of the wife (who has not obtained a judicial separation) having a nationality, domicile, or residence apart from her husband is not recognized. A few of the Protestant States of Germany, and possibly other States, permit a wife living apart from her husband to secure naturalization and then to get a divorce, but most States refuse to recognize such a divorce as valid. *De Bauffremont v. De Bauffremont*, Dalloz, 1878, II, I, 1878, I, 201; 2 Beale's Cases on Conflict of Laws, 99 (France); *In re W's Marriage*, 25 Clunet, 385; 1 Beale's Cas. 428 (Austria). In England the courts now recognize the possibility of a wife deserted by her husband obtaining a divorce in the State where they last lived together, irrespective of his present domicile. *Armytage v. Armytage*, 1898, Pr. 179. In most European States a divorce will be recognized only if obtained in the country to which the parties owe allegiance. In England the divorce will be recognized only when obtained at the domicile of the husband. The English court has recently recognized an American divorce obtained at the wife's domicile, where the husband was domiciled in another American State which recognized the divorce. *Armytage v. Attorney-General* (22 T. L. R. 306). The court, however, took occasion to reiterate the general principle that "it is the husband's domicile which decides the tribunal to try the cause. In Scot-

One State of the Union is, of course, not obliged to recognize the validity of a divorce granted by a court of another State unless that State had jurisdiction to grant it,—a jurisdiction which, as just said, is held to depend upon the domicile of one or both of the parties, and, where the defendant is not domiciled in the State, that notice of the institution of the divorce proceedings, actual or constructive, upon him or her has been served. No valid decree of divorce can, therefore, be granted by the courts of a State in which neither party is domiciled.<sup>75</sup>

Where the plaintiff has not a *bona fide* domicile in the State, the decree of a court cannot render a decree binding in other States even if the non-resident defendant voluntarily enters a personal appearance.<sup>76</sup> However, there is nothing to prevent courts of one State from recognizing, if they see fit, a decree thus granted in another State. The provision of the Federal Constitution is brought into force only when State courts refuse to grant full faith and credit.<sup>77</sup>

In all cases where the defendant has not been summoned within the State, or has not voluntarily appeared, the decree that is rendered has no extraterritorial force except as dissolving the matrimonial status. It cannot control in an extraterritorial manner questions of property rights, custody of children and the payment of alimony.

Until the decision in 1906 of the case of *Haddock v. Haddock*,<sup>78</sup> it had been supposed that a decree of divorce granted the husband or wife by a court of the State in which he or she was domiciled, if the notice of the beginning of the suit required by the local law had been served actually or constructively upon the other party, was to be recognized in all cases as valid in other States. This, it was thought, had been determined in *Atherton v. Atherton*.<sup>79</sup>

In *Atherton v. Atherton* a divorce had been granted, on the ground of desertion, to a husband in Kentucky whose wife had left him and taken up residence in New York. She had not appeared in the suit, but notice had been served upon her by mail. The highest court of New York refused to give effect to this decree upon the ground that the wife had been forced to leave her husband because of cruel treatment, had thereby been

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land and the other countries governed by the Roman-Dutch law there is no requirement whatever of nationality or domicile, but residence of the parties for a certain time within the State is sufficient. *Weatherley v. Weatherley*, Transvaal, Prov. Rep. 66; 1 Beale's Cas. 420." This note is substantially quoted from the article "Constitutional Protection for Decrees of Divorce," by Joseph H. Beale, Jr., in the *Harvard Law Review*, June, 1906 (XIX, 589).

<sup>75</sup> *Bell v. Bell* (181 U. S. 175).

<sup>76</sup> *Andrews v. Andrews* (188 U. S. 14).

<sup>77</sup> *Lynde v. Lynde* (181 U. S. 183).

<sup>78</sup> 201 U. S. 562.

<sup>79</sup> 181 U. S. 155.

entitled to obtain a domicile apart from him, and had not appeared or been personally served with process. The Supreme Court of the United States, however, reversed this holding of the New York court, saying that, inasmuch as the Kentucky court had jurisdiction of the complainant, and constructive service had been had upon the defendant, its decree had to be recognized as conclusively establishing not only the fact of the divorce, but that the wife had abandoned her husband. The opinion declared: "We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made to give the wife actual notice of the suit in Kentucky as to make the decree of the court there, granting a divorce upon the grounds that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to the full extent, it established beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment. To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bonds of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there, he would admit that she had acquired a separate domicile (which he denied), and would disprove his own ground of action, that she had abandoned him in Kentucky."

The court in its opinion was, however, careful to confine the doctrine laid down to the particular case before it. "This case," it declared, "does not involve the validity of a divorce granted on constructive service, by the court of a State in which only one of the parties ever had a domicile, nor the question to what extent the good faith of the domicile may be afterward inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky." The court did, however, affirm the general doctrine that "the purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relations of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind the other. A husband without a wife, or a wife without a husband, is unknown to the law."

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<sup>80</sup> 201 U. S. 562.

The facts of the case of *Haddock v. Haddock*<sup>80</sup> very much resembled those of *Atherton v. Atherton*. The only important difference, if indeed it was an important difference, was that in the *Haddock* case, the decree which was sought to be used as conclusive in another State, had been granted the husband by the courts of a State which was not the original matrimonial domicile, but was the then domicile of the husband. The wife, residing in the State of the original matrimonial domicile, had received only constructive notice. The courts of the State of the wife's domicile refused to recognize the validity of this decree, on the ground that the separation had occurred through the fault of the husband, and their action was upheld by the Federal Supreme Court, that court thus, in effect, deciding that the husband, though divorced in the State (Connecticut) where he had obtained his decree, was not divorced in another State (New York) where his wife—or former wife—resided. In effect, then, limiting the case to the particular facts involved, the doctrine was laid down that where the complainant has abandoned the wife, and obtained a domicile in a State, other than that of the original matrimonial domicile, and only constructive service has been had upon the defendant, no decree of divorce can be granted to which full force and credit must be given in the courts of other States.

In order to distinguish this case from previous adjudications, and especially from that of *Atherton v. Atherton*, the court, in its majority opinion, reviewed the whole subject and laid down the following doctrines as having been definitely established: "First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause, that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. (*Harding v. Harding*, 198 U. S. 317.) Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the Fourteenth Amendment, void as against the non-resident, even in the State where rendered; and, therefore, such non-resident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the State where rendered, the enforcement of such a judgment. (*Pennoyer v. Neff*, 95 U. S. 714.)"

Applying these principles to the case at bar the court held, in the first place, that a suit for divorce is essentially an action *in personam* and not *in rem*; and, in the second place, that, by wrongfully deserting his wife, the domicile of the wife, contrary to the general rule, did not continue

to be that of the husband when he removed to Connecticut, but continued to be in New York, the State of the original matrimonial domicile. Therefore, it was held that the Connecticut courts, never having obtained personal service upon the wife, and the action being *in personam*, no decree could be rendered against her that would affect her status anywhere except in the State where the judgment was rendered. In effect, it was held that in order to render a decree of divorce that would have to be recognized by the courts of other States, a court must have jurisdiction of both of the parties, that is, of the complainant by *bona fide* residence creating a domicile, and of the defendant either by domicile in the State, by personal service, by actual appearance, or by constructive service. But that this constructive service cannot be relied upon in cases where the defendant, having had good reason for separating from the complainant, has obtained or retained a domicile in another State.

In the Atherton case, it was argued that the constructive service upon the wife had been sufficient to give the court jurisdiction because the wife had not been able to obtain a domicile apart from her husband by wrongfully separating herself from her husband. In the Haddock case, however, the complainant had deserted the defendant and matrimonial domicile, and, therefore, the libellee had been entitled to retain her domicile in New York, after the removal of her husband to Connecticut.<sup>81</sup>

Four justices dissented. In the opinion concurred in by them it was argued that the case was governed by the doctrines laid down in Atherton v. Atherton. In that case it was held that jurisdiction over a domiciled complainant and constructive service over the defendant were sufficient to support a decree which was entitled to full force and credit in other States. In the case at bar the domicile of the complainant was a *bona fide* one, and, it was argued, the fact that it was or had been a matrimonial domicile or that the complainant had wrongfully left his wife were irrelevant. The fact that the Connecticut court had granted the divorce was, or should have been, it was argued, conclusive upon the New York courts that the defendant had deserted the complainant and not *vice versa*. It was denied that a proceeding for divorce is a personal one (though a suit *in personam* is often incorporated with it). In short, then, the *bona fide*

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<sup>81</sup> In *Williamson v. Osenton* (232 U. S. 619), which was a suit brought in a Federal court on ground of diversity of citizenship, the court, in upholding the right of a wife who has justifiably left her husband and removed into another State to obtain a domicile there, said: "That in this country a wife in the plaintiff's circumstances may get a different domicile from that of her husband for purposes of divorce is not open to dispute. *Haddock v. Haddock* (201 U. S. 562). This she may do without necessity and simply from choice, as the cases show, and the change that is good as against her husband ought to be good as against all. . . . We see no reason why the wife who justifiably has left her husband should not have the same choice of domicile for an action of damages that she has as against her husband for a divorce."

domicile of the complainant being granted, and constructive service such as the *lex fori* demanded being had, and decree for divorce actually rendered, the merits of the case, that is, as to which of the parties was responsible for the separation, the dissenting justices argued, were no longer open for examination, and hence the question as to where was or had been the matrimonial domicile became irrelevant.

It will be seen that the Haddock case is not to be regarded as having reversed the Atherton case, for the two cases were distinguished from each other by reason of the fact that, in the Atherton case, the decree had been rendered against the non-resident defendant at the matrimonial domicile, that is, at the place where the parties had last lived together as husband and wife with *animo manendi*, and where one spouse had his or her domicile when the action for divorce was brought. In effect, then, to quote the words of a recent authority, the law stands thus: "A divorce decree rendered by a court at the matrimonial domicile, in accordance with prescribed procedure, must be recognized in another State under the full faith and credit clause of the Constitution, even as against a non-resident defendant who was not served within the State and who did not appear in the suit. But a decree rendered at the separate domicile of one party only against a non-resident under precisely similar circumstances need not, as a matter of Federal compulsion, be so recognized, at least as against a defendant who remained domiciled at the matrimonial domicile."<sup>82</sup>

In *Thompson v. Thompson*<sup>83</sup> the Atherton and Haddock cases were reviewed, and the point emphasized that, in the Haddock case, there had been no violation of the full faith and credit clause by the refusal of the New York court to give credit to the Connecticut judgment because "there was not at any time a matrimonial domicil in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State." In the Thompson case the parties had been married in Virginia and had their matrimonial domicile there, where, his wife having abandoned him, the husband obtained a decree of divorce, notice by publication being served upon the wife. The wife having sued in the courts of the District of Columbia for separate maintenance, the highest court of the District sustained the plea that the Virginia decree barred the action. This holding, the Supreme Court, on appeal, affirmed, saying:

"In the present case it appears that the parties were married in the State of Virginia, and had a matrimonial domicil there, and not in the District of Columbia or elsewhere. The husband had his actual domicil in that State at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the Atherton Case and the

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<sup>82</sup> Goodrich, *Handbook on the Conflict of Laws*, ed. 1927, p. 295.

<sup>83</sup> 226 U. S. 551.



principles upon which it rests, that the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that State could proceed to adjudicate respecting it upon grounds recognized by the laws of that State, although the wife had left the jurisdiction and could not be reached by formal process." . . . It is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia.

It would appear from the above cases that the present doctrine is that if a wife or husband wrongfully, that is, without sufficient excuse or justification, leaves the husband or wife and seeks to obtain a new domicile in another State, he or she cannot there obtain a divorce which will be entitled to full faith and credit in the other States, unless, of course, the other party has been personally served or has made voluntary appearance.

It would further appear, though this has not been expressly covered by decisions of the Supreme Court, that, though, in general, a husband can at will change his domicile, he cannot, by using this domicile, secure a divorce from his non-resident wife who has not been personally served or appeared or otherwise given her consent, unless his wife has given him justifiable cause for leaving her. As for the wife, she cannot secure a domicile different from that of her husband which will avail for any purposes unless her husband has given her sufficient cause for deserting him.

#### § 156. State Courts and Comity as between the United States and Foreign Nations.

It is clear that it is within the right of every sovereign State to determine, according to its own conceptions of the moral and utilitarian obligations of comity, what force and effect it will give in its own courts to the laws, judgments and other public acts of other sovereign States. Inasmuch as dealings with foreign States are, in the United States, solely a matter of Federal concern, it would seem that this matter of international comity, which is a matter of policy, should be determined exclusively by the National Government. In fact, however, there has been little or no attempt to regulate the matter by Federal statutes, with the result that the Federal courts, in cases arising in them, have built up for themselves their own doctrines of comity and conflict of laws similar to the "general jurisprudence" recognized in *Swift v. Tyson*,<sup>84</sup> and the State courts have done the same as to cases coming to them in which have been involved the force and effect to be given to the laws, judgments, decrees and other public acts of foreign countries. The late Professor Henry Schofield, in a note to one of his valuable constitutional essays, has raised the point whether it would not be constitutional, as well as highly desirable, that Congress should control by statute all the courts of the United States, Federal and

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<sup>84</sup> 16 Pet. 1.

State, in the exercise of jurisdiction in cases in which international comity is involved. He said: "As respects the comity of the United States towards the enforcement of rights acquired under the laws of foreign countries, is it true that the power to declare the comity of the United States toward such rights is reserved to the States to be exercised by their courts and legislatures subject to no Federal supervision or control except under the grant of the treaty-making power? It seems to be so supposed, and, presumably, the judicial rule of comity declared and applied in *Hilton v. Guyot* toward the enforcement of a French judgment in a case in a Federal court between a citizen of France and a citizen of the United States and New York would be classified as general jurisprudence under *Swift v. Tyson*, binding only Federal judges. But it does not seem more difficult to find a delegation of the power to the United States by implication from several grants of power to the United States and the prohibitions on the States, taken together, than it was to find an implied power to Congress to incorporate a bank, to make paper money legal tender, or to exclude and deport aliens. It is fairly possible to say the power is a Federal judicial power lodged in the Federal courts, even if it is not thought fairly possible to say the power is a legislative power lodged in Congress. State judicial and legislative power, to declare the comity or policy of the Nation towards foreign countries, seems a very peculiar anomaly under the Federal Constitution."<sup>85</sup>

Professor W. W. Cook, in an able article,<sup>86</sup> argues with convincing force the proposition that, as shown by the history of the clause and its wording, Congress has the constitutional power, and should exercise it, to provide, in a mandatory manner, that judgments entered by the courts of one State shall be directly enforceable in the other States, without the necessity of instituting a new suit upon them and obtaining new judgments upon which execution can there be had; and also that rights created by the legislative acts of a State shall be recognized by the courts of the other States. Such congressional action, he urges, would be well within the scope of the authority granted to Congress to prescribe by general laws the "effect" to be given to the public acts, records and judicial proceedings of one State in the other States of the Union. Professor Cook also raises the question whether a writ or summons may not be deemed a judicial proceeding, and, if so, whether Congress could not provide for the service of such State processes throughout the United States.

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<sup>85</sup> *Constitutional Law and Equity*, Vol. I, Appendix, p. xiv, note.

<sup>86</sup> "The Power of Congress Under the Full Faith and Credit Clause," 28 *Yale Law Journal*, 421.



## CHAPTER XIII

### INTERSTATE RELATIONS: THE COMITY CLAUSE <sup>1</sup>

#### § 157. Privileges and Immunities.

Article IV, Section 2 of the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This provision has for its general aim the prevention of arbitrary and vexatious discriminations by the several States in favor of their own citizens and against the citizens of other States. "It was undoubtedly the object of the clause in question," said the Supreme Court in *Paul v. Virginia*,<sup>2</sup> "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."<sup>3</sup> Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

In an early case in the Federal Circuit Court of *Corfield v. Coryell*,<sup>4</sup> as has been earlier noted, Justice Washington attempted a still more particular, though not an exhaustive, enumeration of the privileges and immunities that are protected from State discrimination.<sup>5</sup>

Much of Justice Washington's language was *obiter*, the determination of the enumerated privileges and immunities not being necessarily involved

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<sup>1</sup> See generally, upon this subject, Howell, *The Privileges and Immunities of State Citizenship* (Johns Hopkins University Studies in Historical and Political Science, Vol. XXXVI, 1918).

<sup>2</sup> 8 Wall. 168.

<sup>3</sup> Citing *Lemmon v. The People of N. Y.* (20 N. Y. 607).

<sup>4</sup> 4 Wash. C. C. 371.

<sup>5</sup> See *ante*, Chapter XI.

in the case. Many of these rights have, however, in subsequent cases, been specifically passed upon and sustained,<sup>6</sup> and it is believed that there is not one of them that would not be declared by the Supreme Court, in a proper case, to be beyond the discriminatory power of the States. Thus in *Ward v. Maryland*<sup>7</sup> it was held that a State might not levy a license tax upon temporary residents, as a condition precedent to allowing them to sell certain goods. So also the granting of licenses to trade cannot be limited to residents.<sup>8</sup> Nor can a State, except by proper quarantine and other police regulations, deny to citizens of other States free ingress and egress, or the right to export or import property.<sup>9</sup>

In *Ward v. Maryland* the court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the States, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell or offer or expose for sale within the district prescribed in the indictment any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In *United States v. Wheeler*<sup>10</sup> it was declared that the comity clause of the Constitution merely limits the right of a State to exclude citizens of the other States from privileges granted to its own citizens, and that it does not deprive the States of their right to deal with the right of residence and of ingress and egress thereinto or therefrom except to the extent of such limitation. This case came to the Supreme Court by writ of error from a lower Federal court which, on the ground that there was no Federal consti-

<sup>6</sup> See especially two articles by W. J. Meyers in *Michigan Law Review*, I, pp. 286, 364, entitled "The Privileges and Immunities of Citizens in the Several States."

<sup>7</sup> 12 Wall. 418; 20 L. ed. 449.

<sup>8</sup> *In re Wilson* (15 Fed. 511).

<sup>9</sup> This last is unconstitutional as well by the commerce clause of the Constitution.

<sup>10</sup> 254 U. S. 281.

tutional jurisdiction to punish the acts complained of, had quashed an indictment which had charged that the accused had forcibly transported citizens of the United States out of the State of Arizona and prevented their return thereto in violation of Section 19 of the Federal Criminal Code which declares illegal and provides for the punishment of persons conspiring "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." The Supreme Court said: "Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States had, prior to the Confederation, a two-fold aspect: (1) As possessed in their own States; and (2) as enjoyed in virtue of the comity of other States. But although the Constitution fused these distinct rights into one, by providing that one State should not deny to the citizens of other States rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one State in another of rights possessed in that State by its own citizens was a violation of a right afforded by the Constitution."

In *Canadian Northern Ry. Co. v. Eggen*<sup>11</sup> it was again emphasized that the comity clause does not require that the States shall give to the citizens of other States precisely the same rights as are given to their own resident citizens provided that the rights that are granted to the citizens of the other States are adequate in the premises. Thus, in the instant case, the court upheld a State statute which provided that, when a cause of action arose outside the State and was barred by the laws of the place where it arose, no action should be maintained thereon unless the plaintiff were a citizen of the State which had owned the cause of action since it accrued. In this case the State in which the cause of action had arisen had allowed one year within which to bring action, which period had expired before the bringing of the action. However, if the provision of the State law which has been referred to were held unconstitutional the general Statute of Limitations of the State would apply which allowed six years and would not bar the suit. Regarding the State law whose constitutionality was contested, the Supreme Court said:

"It has been in force ever since the State was admitted into the Union in 1858; it is in terms precisely the same as those of several other states, and in substance it does not differ from those of many more. It gives a nonresident the same rights in the Minnesota courts as a resident citizen has, for a time equal to that of the statute of limitations where his cause of action arose. If a resident citizen acquires such a cause of action after it has accrued, his rights are limited precisely as those of the nonresident are, by the laws of the place where it arose. If the limitation of the foreign

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<sup>11</sup> 252 U. S. 553.

State is equal to or longer than that of the Minnesota statute, the non-resident's position is as favorable as that of the citizen.

"It is only when the foreign limitation is shorter than that of Minnesota, and when the nonresident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign State (which happens to be the respondent's case), that inequality results—and for this we are asked to declare a statute unconstitutional which has been in force for 60 years. . . . Such a literal interpretation of the clause cannot be accepted. From very early in our history requirements have been imposed upon nonresidents in many, perhaps in all, of the States as a condition of resorting to their courts, which have not been imposed upon resident citizens. . . . The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

"This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect."

### § 158. Political Privileges.

The interstate comity clause of the Federal Constitution does not compel the several States to grant to resident citizens of the other States the political privileges extended to their own citizens. This the Supreme Court held from the very beginning and reaffirmed in the case of *Blake v. McClung*.<sup>12</sup> "A State," said the court in that case, "may by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a

<sup>12</sup> 172 U. S. 239.

citizen of one State in a condition of alienage when he is within or removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

Finally, it is to be said, the several States may impose upon non-residents such special limitations and obligations as are, in aim and effect, not discriminative but reasonably necessary for the protection of their own citizens from fraud, disease, or injury of any sort. Thus, as an example, though the citizens of other States may not be forbidden to sue in the courts of the State, they may be required to give bonds for costs which bonds are not exacted of residents.<sup>13</sup>

In connection with this police power of the States a difficult question is raised as to the constitutionality of laws conditioning the exercise of certain professions, such as law, medicine, and dentistry, upon residence in the State for specified periods of time. There is no question but that the State in the legitimate exercise of its police power may require evidence of good character or sufficient technical attainments of all persons desiring to practice these professions. A certain period of residence in the State may, therefore, possibly be a proper requirement, in order that the applicant's moral character and general attainments may be learned, but it would seem that if this required period be made unnecessarily long, it might be held that non-residents are unduly discriminated against. We have, however, no cases in which this position has been taken.

#### § 159. State Proprietary Privileges.

In *McCready v. Virginia*<sup>14</sup> the important limitation of the clause was established that a citizen of one State is not, of constitutional right, entitled to share upon equal terms with the citizens of another State those proprietary interests which may be said to belong generally to that State as such. This case involved the right of cultivating oysters on beds of the tide waters of the States. The court in its opinion said: "We think we

<sup>13</sup> In *Chemung Canal Bank v. Lowery* (93 U. S. 72), it was held that a Wisconsin statute was not in violation of the equal privileges clause because it provided that when a defendant to a suit was out of the State, the statute of limitations should not run against a resident plaintiff, but that it should if he were a non-resident. The court held that this was a reasonable provision. "If," said the court, "the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin, it may be only in a railroad train, a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant after the laws which had always governed the case had barred any recovery." To the author this reasoning seems hardly convincing.

<sup>14</sup> 94 U. S. 391.

may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State."<sup>15</sup>

§ 160. Privileges of One State Not Carried into Other States.

The comity clause does not entitle a citizen within his own State to privileges and immunities which may be granted by other States to their citizens. In other words, it does not require that when a right is granted by any one of the States of the Union to its citizens, it thereby becomes a right which all the other States must grant to their citizens. This claim, extreme as it may appear, was raised in *McKane v. Durston*<sup>16</sup> but negatived by the court as scarcely worth an argument. "Whatever may be the scope of Section 2 of Article IV," said the court, . . . "the Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one State under the Constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by the citizens of another State under its Constitution and laws. . . . A citation of authorities upon the point is unnecessary."

It also scarcely needs argument that under this equal privileges clause a citizen of one State residing, or having legal interests in another State, may not lay claim to privileges and immunities which his own State grants him, but which the other State does not grant to its own citizens.

In *Paul v. Virginia*<sup>17</sup> the court said: "The privileges and immunities

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<sup>15</sup> The opinion continued: "If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free government,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality. The planting of oysters in the soil covered by water owned in common by the People of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

<sup>16</sup> 153 U. S. 684.

<sup>17</sup> 8 Wall. 168.



secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States."

**§ 161. Corporations Not Citizens within the Meaning of the Comity Clause.**

In *Paul v. Virginia* the doctrine, never since questioned, was laid down that a corporation is not a citizen within the meaning of the term as used in the comity clause. Inasmuch as a corporation is the mere creation of local law, the court declared, it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it is created. In other words, the interstate comity clause of the Federal Constitution does not necessitate the recognition by the several States of corporations created by any of the other States. "Having no absolute right of recognition in other States," the court said, "but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This principle of State omnipotence when dealing with the corporations of other States is, however, limited in three very important respects. In so far as such corporations are engaged in the conduct of interstate commerce they may not be controlled, the regulation of this subject being exclusively a Federal concern; they may not be deprived of property without due process of law or denied the equal protection of the laws; and the obligation of contracts entered into with them may not be impaired.<sup>18</sup>

An instructive construction by the Supreme Court of the comity clause in its application to corporations is to be found in the case of *Blake v. McClung*,<sup>19</sup> decided in 1898. In that case an act of the State of Tennessee was held unconstitutional which provided that resident creditors of mining and manufacturing corporations chartered in other States, and doing business in the State of Tennessee should have "a priority in the distribution of assets, or subjection to the same, or any part thereof, to the pay-

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<sup>18</sup> These limitations will be more fully treated in later chapters.

<sup>19</sup> 172 U. S. 239.

ment of debts over all simple contract creditors, being residents of any other country or countries." After calling attention to the fact that the court had never attempted to give an exact or comprehensive definition of the clause "privileges and immunities" but had deemed it "safe, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein," the court nevertheless went on to quote with approval the enumeration of Justice Washington in *Corfield v. Coryell*, and that given in the opinion of the court in *Paul v. Virginia* and *Ward v. Maryland*. The opinion then continued: "These principles have not been modified by any subsequent decision of this court. The foundation upon which the above cases rests cannot, however, stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth article of the Constitution of the United States, although generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter into its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States." <sup>20</sup>

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<sup>20</sup> Chief Justice Fuller and Justice Brewer dissented. For later decisions with reference to the conditions that the States may constitutionally impose upon foreign cor-



In *Bothwell v. Buckbee, Mears Co.*<sup>21</sup> it was held that a State might not only prohibit a foreign insurance company from doing business within its limits (the issuance of insurance policies not being interstate commerce), but that it might refuse the aid of its courts in enforcing a contract of insurance which involved a violation of its laws. Furthermore, that a contract of insurance executed in one State in accordance with an application therefor illegally secured in another State was tainted with illegality so that the courts of the State where the application was illegally secured were not obligated to enforce it.

**§ 162. Citizens of Territories and Indian Reservations and the Comity Clause.**

It has been held that the citizens of Territories and residents upon Indian Reservations are not entitled to the benefits of the comity clause, and that, conversely, non-residents can be denied privileges and immunities that are enjoyed by the residents of these areas.<sup>22</sup> However, as to the inheritance, purchase, lease, sale, holding and conveying of real and personal property, it has been declared by Congress that all citizens of the United States shall have the same rights in every State and Territory as are enjoyed by white citizens therein.<sup>23</sup>

Further application of the comity clause will be considered in connection with the discussion of the taxing and police powers of the States, and the limitations imposed upon them by reason of vesting in Congress of the exclusive power to regulate interstate and foreign commerce, and also by the prohibitions of the Fourteenth Amendment directed to the States as to the denial to persons of the equal protection of their laws, or of due process of law.

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porations, see *Blake v. McClung* (176 U. S. 64); *Sully v. American National Bank* (178 U. S. 289); *Waters-Pierce Oil Co. v. Texas* (177 U. S. 28); *Orient Insurance Co. v. Daggs* (172 U. S. 557); *W. U. Tel. Co. v. Kansas* (216 U. S. 1); *Pullman Co. v. Kansas* (216 U. S. 56).

<sup>21</sup> 275 U. S. 274.

<sup>22</sup> *McFadden v. Blocker* (3 Ind. Terr. 224); *Sutton v. Hayes* (7 Ark. 462); *In re Johnson's Estate* (139 Calif. 532).

<sup>23</sup> Rev. Stat., Sec. 1978. This provision is from the act of May 31, 1870, passed by Congress in pursuance of its power to enforce the Fourteenth Amendment, and with the obvious purpose of preventing the denial of equal protection of the laws to the negro.

## CHAPTER XIV

### INTERSTATE RELATIONS: EXTRADITION

#### § 163. Interstate Extradition.

The Constitution provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."<sup>1</sup>

The words "treason, felony or other crime," as used in Article IV, Section 2, Clause 1, include every offence against the penal law, from the highest to the lowest, misdemeanors as well as felonies.<sup>2</sup>

By the act of February 12, 1793 (now Section 5278 of the Revised Statutes) Congress provided as follows: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the said State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority making such demand, or to the agent of such authority, appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."<sup>3</sup>

In the case of *Kentucky v. Dennison*,<sup>4</sup> decided by the Supreme Court in 1860, the respective powers and duties of the State and Federal Govern-

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<sup>1</sup> Art. IV, Sec. 2, Cl. 2. The wording of this clause indicates that the framers of the Constitution held the view that there might be "treason" against a State of the Union.

<sup>2</sup> *Kentucky v. Dennison* (24 How. 99); *Appleyard v. Massachusetts* (203 U. S. 222)

<sup>3</sup> The operation of this act has been extended to the Philippine Islands, which, for the purposes of the act, are deemed a Territory of the United States.

<sup>4</sup> 24 How. 66.

ments in respect to the extradition of criminals, came up for adjudication. Congress, as has been seen, had passed a law declaring that, upon request from the State from which the fugitive has escaped, "it shall be the duty of the executive authority of the State" to cause the fugitive to be seized and delivered to the agent of the demanding State. Dennison, the governor of Ohio, refused the request of the Commonwealth of Kentucky to surrender a fugitive from her borders. Thereupon a mandamus was asked from the Federal court to compel him to do so. This writ the Supreme Court in a unanimous opinion refused to issue, the argument of Taney, who prepared the opinion of the court, being as follows: The duty of providing by law the regulations necessary for carrying into effect this right to extradition manifestly belongs to Congress. "For," said Taney, "if it was left to the States, each might require different proof to authenticate the judicial proceedings upon which the demand was founded." Furthermore, Taney declared, the duty that is laid upon the governors of States by the Constitution and by the laws that Congress had passed regulating the subject is a mere ministerial duty, and, therefore, one the performance of which may ordinarily be compelled by the courts. Continuing he held that the clause in question by the use of the words "treason, felony or other crime," properly included every act forbidden and made punishable by a State, and did not leave to the governor of a State to which a fugitive from justice might flee, the right to refuse to surrender him upon the ground that the act in question was not one made punishable by the law of the State of which he was the chief executive. "The argument on behalf of the governor of Ohio," said Taney, "which insists upon excluding from this clause new offenses created by a statute of the State and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The governor of the demanding State would probably draw one line, and the governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right and yet defining that right so loosely as to make it a never failing subject of dispute and ill will." Also, he declared, it is certain that the words "it shall be the duty" when employed in the ordinary acts of legislation, imply an assertion of the right to command and coerce obedience. "But," said Taney, "looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion the words 'it shall be the duty' were not

used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal." <sup>5</sup>

There have since been a number of occasions on which a governor of one State has refused the extradition of a person found within its borders and who had admittedly come from the State which asked for his return. A notable instance was the refusal of the governor of Indiana to permit the extradition of ex-Governor Taylor of Kentucky who was indicted in the latter State as having been a party to the murder of Governor Goebel.

Though Congress has never attempted to exercise the power, and, therefore, the question has never been tested in the courts, there would seem to be little doubt that a Federal law would be constitutional which would place the matter of the interstate rendition of fugitives from justice in the hands of Federal officials, demand for their surrender having been made by the executive of the States from which they have fled. The provision of the Federal Constitution (Art. IV, Sec. 2, Clause 2) makes no reference to action upon the part of the authorities of the States to which they have fled. It simply says that, upon demand of the executive of the State from whose justice he has fled, the person charged with crime shall be surrendered and removed to that State. This, then, is a Federal obligation, and, in the absence of any negative provision, it would seem clear that Congress has an implied power to provide for its fulfilment through Federal agencies.<sup>6</sup>

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<sup>5</sup> For a further discussion and criticism of the case of *Kentucky v. Dennison*, see *post*, § 926.

<sup>6</sup> In his opinion in the case of *In re Voorhees* (32 N. J. L. 140), Chief Justice Beasley said (*obiter*): "I can entertain no doubt of the power of Congress to vest in any National officer the authority to cause the arrest in any State of a fugitive from the justice of another State and to surrender such fugitive on the requisition of the executive of the latter State. The National right to require the surrender, under the terms of the Constitution, seems to me to be clear, and all that is necessary to render such right enforceable in every case is the necessary organ of the Federal Government."

**§ 164. Judicial Examination of Extradition Proceedings.**

"Upon the executive of the State rests the responsibility of determining, in some legal mode, whether [the one claimed] is a fugitive of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."<sup>7</sup>

In *Marbles v. Creecy*<sup>8</sup> the court said:

"It is true that it does not appear from the record before us that there was any evidence before the governor of Missouri other than the requisition of the governor of Mississippi and a copy of the indictment against the alleged fugitive, certified to be authentic. It is also true that, so far as the Constitution and laws of the United States are concerned, the governor of Missouri could not legally have issued his warrant of arrest unless the accused was charged with what was made by Mississippi a crime against its laws, and was a fugitive from justice. But those facts were determinable in any way deemed satisfactory by that executive, and he was not bound to demand—although he may have required if the circumstances made it proper to do so—proof apart from proper requisition papers that the accused was so charged and was a fugitive from justice. He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi, and that he was not a fugitive from justice. No such proof appears to have been offered to the governor or to the court below. But the official documents, reasonably interpreted, made a *prima facie* case against the accused as an alleged fugitive from justice, and authorized that executive to issue his warrant of arrest as requested by the governor of Mississippi. The contention that the governor of Missouri could not act at all on the requisition papers in the absence of the accused, and without previous notice to him, is unsupported by reason or authority, and need only be stated to be rejected as unsound."

The principles here announced are firmly established by the decisions of this court.<sup>9</sup>

In this case the petitioner was a negro who claimed that, because of race feeling, he was in danger of assassination, if removed to Mississippi, but the court held that this suggestion, unaccompanied by proof, was not sufficient to control the governor of Missouri in the discharge of his duty

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<sup>7</sup> *Ex parte Reggel* (114 U. S. 642). Independent proof apart from the requisition papers that the accused is a fugitive from justice need not, however, be demanded by the governor of the surrendering State. *Pettibone v. Nichols* (203 U. S. 192).

<sup>8</sup> 215 U. S. 63.

<sup>9</sup> Citing: *Illinois ex rel. McNichols v. Pease* (207 U. S. 100); *Ex parte Reggel* (114 U. S. 642, 652, 653); *Roberts v. Reilly* (116 U. S. 80, 95); *Hyatt v. New York* (188 U. S. 691, 719); *Munsey v. Clough* (196 U. S. 364, 372); *Pettibone v. Nichols* (203 U. S. 192); and *Appleyard v. Massachusetts* (203 U. S. 222).

to surrender the fugitive in conformity with the laws and Constitution of the United States.

§ 165. Auxiliary Legislation by the States.

The power of Congress by legislation to render effective the extradition clause is not exclusive, and does not, therefore, exclude the power of the State to enact measures auxiliary thereto. Indeed, such additional legislation is, in general, necessary, as, for example, laws for inquiry into the fact whether the person demanded was actually, and not constructively, within the State claiming him, when the offence charged was committed.<sup>10</sup>

The governor cannot be compelled by judicial process, State or Federal, to take action, but where he has acted, his action may be inquired into by the courts. Thus in *Roberts v. Reilly*<sup>11</sup> the court said: "The Act of Congress (§ 5278, R. S.) makes it the duty of the executive authority of the State to which such person has fled, to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate of any State, charging the person demanded with having committed the crime therein, certified as authentic by the governor or chief magistrate of the State from whence the person so charged has fled. It must appear, therefore, to the governor of the State to whom such a demand is presented, before he can lawfully comply with it; first, that the person demanded is substantially charged with a crime against the laws of a State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be viewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."<sup>12</sup>

<sup>10</sup> *Ex parte McKean* (3 Hughes [U. S.] 23); *Ex parte Ammons* (34 Ohio St. 318). See 3 Federal Statutes Annotated, 79, note. See also *Innes v. Tobin* (240 U. S. 127).

<sup>11</sup> 116 U. S. 80.

<sup>12</sup> See also *Hyatt v. New York* (188 U. S. 691).

In *Biddinger v. Commissioner of Police*,<sup>13</sup> it was held that the plea that the prosecution of the offence with which a fugitive from justice is charged is barred by the Statute of Limitations is one that may be set up only on his trial in the State where the crime was committed, and may not be entertained on habeas corpus proceedings instituted by the fugitive to obtain his release from the custody of the authorities of the State to which he has fled.

In *Marbles v. Creecy*,<sup>14</sup> in which the person apprehended and held for extradition had applied to a Federal court for a writ of habeas corpus, it was alleged that the petitioner was a negro, and that, by reason of the race feeling in the State from which he had fled, there was danger that, should he be returned, he would be assassinated or denied a fair and impartial trial. As to this the Supreme Court said: "It is clear that the executive authority of a State in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the State to which it is sought to remove him, nor be adequately protected, while in the custody of such State, against the action of lawless and bad men. The court that heard the application for discharge on writ of habeas corpus was entitled to assume, as no doubt the governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers, and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice."

**§ 166. Who Is a "Fugitive."**

"To be a fugitive from justice . . . it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."<sup>15</sup>

In *Appleyard v. Massachusetts* <sup>16</sup> it was held that the belief of the ac-

<sup>13</sup> 245 U. S. 128.

<sup>14</sup> 215 U. S. 363.

<sup>15</sup> *Roberts v. Reilly* (116 U. S. 80).

<sup>16</sup> 203 U. S. 272.



cused, when leaving the demanding State, that he had not committed a crime against the State, did not prevent his being a fugitive from justice within the meaning of the Constitution and the acts of Congress relating to extradition. To be a fugitive from justice, it was declared, it is only necessary that the accused should have been within the demanding State at the time the crime was committed, and that thereafter he be found within the borders of another State. A fugitive from justice when apprehended in the State to which he has fled, and held for extradition, though restrained of his liberty, under color of authority derived from the Constitution and laws of the United States, is not in the custody of the United States, but of the States. When so apprehended, however, the fugitive has the right to test the lawfulness of his arrest by writ of habeas corpus issued either by a State or Federal court.<sup>17</sup>

In *Drew v. Thaw* <sup>18</sup> it was held that the motive which induces one to depart from a State has nothing to do with the question as to whether or not he is, in fact, a fugitive from the justice of that State.

In *Hyatt v. New York* <sup>19</sup> it was definitely held, without qualification, that in order to be a "fugitive from justice" within the meaning of the constitutional clause, and of the statutes relating thereto, the person sought to be extradited must have been actually, and not merely constructively, within the demanding State at the time the crime charged was committed. Furthermore, in this case it was held that one who came into the State on business for a single day eight days after the alleged commission of the crime, and months before indictment found, was not, by his departure therefrom, thereby brought within the terms of the statute providing for rendition.<sup>20</sup>

"The result [of this holding of the Supreme Court] is," to quote the words of Judge Reid in an address before the American Bar Association, "that the informed criminal may commit numerous crimes with absolute impunity. He may commit murder, manslaughter or assault by shooting his victim across a State line, or by sending to him through a transportation agency an infernal machine, poison or other destructive substance or agency; he may, by the medium of advertisements or of correspondence, obtain money or property by false pretences; he may commit other numerous frauds by means of false representations; he may spread a criminal libel, or utter forged instruments, or he may abandon to their fate help-

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<sup>17</sup> *Roberts v. Reilly* (116 U. S. 80).

<sup>18</sup> 235 U. S. 432.

<sup>19</sup> 188 U. S. 691.

<sup>20</sup> "It is sufficient for the party charged to show that he was not in the State at the times named in the indictments; and when these facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed."



less dependents for whose support he is legally bound. All he need to do is to remain in the asylum from which he has directed his criminal efforts, and unless he has offended against the laws of the State where he abides, he may remain brazenly impudent in respect to his crimes in other States."<sup>21</sup>

However, in *Strassheim v. Daily*<sup>22</sup> the court held that one who does, within a State, an overt act which is, and is intended to be, a material step towards the accomplishing of a crime, and then leaves the State, and completes the crime in another State, is a fugitive from the justice of the first State. "For all that is necessary," the court said, "to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after incurring guilt there, and his overt act becomes retrospectively guilty when the contemplated result ensues."

A number of decisions have held that the asylum State may satisfy the demands of its own laws before surrendering a fugitive to the State from which he has fled. "When a demand is properly made by the governor of one State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter case have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied."<sup>23</sup>

In *Innes v. Tobin*<sup>24</sup> the plaintiff had been extradited to Texas from Oregon, on charge of murder, and tried and acquitted in the courts of the former State. However, without being released from custody, the plaintiff was then surrendered, upon extradition proceedings, to the authorities of Georgia from whose justice she was charged to be a fugitive. Habeas corpus proceedings having been instituted, and the case having reached the Supreme Court upon writ of error, that court held that the case was not covered by the legislation of Congress (Revised Statutes, Section 5278), and that this failure upon the part of Congress so to provide left the matter within the discretionary power of the States to act as they might see fit according to the general principles of comity. The court said: "No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, State or National. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have

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<sup>21</sup> "Interstate Extradition for Extra-territorial Crimes" by A. H. Reid, Reports of the *American Bar Association*, 1920, p. 432.

<sup>22</sup> 221 U. S. 280.

<sup>23</sup> *Taylor v. Taintor* (16 Wall. 366).

<sup>24</sup> 240 U. S. 127.

been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them,—State authority until it was deemed essential by further legislation to govern them exclusively by National authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt. This becomes manifest when it is considered that, if the proposition now insisted upon were accepted, it would follow that the delivery of a criminal who was a fugitive from justice by one State on a requisition by another would exhaust the power, and the criminal, therefore, whatever might be the extent and character of the crimes committed in other States, would remain in the State into which he had been removed without any authority to deliver him to other States from whose justice he had fled. And this, while paralyzing the authority of all the States, it must be moreover apparent, would cause them all to become involuntary asylums for criminals; for no method is suggested by which a criminal brought into a State by requisition, if acquitted, could be against his will deported, since to admit such power would be virtually to concede the right to surrender him to another State as a fugitive from justice for a crime committed within its borders.

“It follows from what we have said that the court below was right in refusing to discharge the accused, and its judgment, therefore, must be and it is affirmed.”

**§ 167. Abduction and Forcible Return of Fugitives from Justice.**

It has been decided <sup>25</sup> that where a fugitive has been forcibly abducted, without being extradited, from a State to which he has fled to the State from which he had fled, neither the Federal Government, nor the State whose peace has thus been violated, nor the abducted one, has legal redress, unless, indeed, the governor of the State to which he has been taken is willing to return him, and to extradite the persons participating in the abduction. The case of Mahon grew out of the following facts. Mahon, charged with murder in the State of Kentucky, fled to West Virginia. During a correspondence between the governors of the two States regarding extradition, he was forcibly abducted from the latter State and taken to the former State, and there confined in jail pending his trial for murder. Thereupon the governor of West Virginia, on behalf of that State, presented in a District Court of the United States a petition stating these facts, and adding that he had made a requisition upon the governor of Kentucky that Mahon be released and returned to West Virginia, but that such requisition had been refused. Therefore, a writ of habeas corpus was prayed directed to the keeper of the jail where Mahon was confined. A similar petition was filed by Mahon himself. Upon return of the writ

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<sup>25</sup> Mahon v. Justice (127 U. S. 700).

the motion for discharge was denied by the court; appeal was taken to the Circuit Court, where the order of the lower court was affirmed; and from this order an appeal was taken to the Supreme Court. In its opinion, affirming the action of the lower tribunals, the Supreme Court said: "If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties abducted, and of parties committing the offense, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures that they might deem necessary as redress for the past and security for the future. But the States of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the Federal Constitution. They cannot declare war or authorize reprisals on other States. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by the citizens of other States.

"If such violators have escaped from the jurisdiction of the State invaded, their surrender can be secured upon proper demand on the executive of the State to which they have fled. The surrender of the fugitives in such cases, to the State whose laws have been violated, is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one State by intruders and lawless bands from another State. The offenses committed by such parties are against the State; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice. No mode is provided by which a person unlawfully abducted from one State to another can be restored to the State from which he was taken, if held upon any process of law for offenses against the State to which he has been carried. If not thus held he can, like any other person deprived of his liberty, obtain his release on habeas corpus. Whether Congress might not provide for the compulsory restoration to the State of parties wrongfully abducted from its territory upon application of the parties, or of the State, and whether such provision would not greatly tend to the public peace along the borders of the several States, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided."<sup>26</sup>

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<sup>26</sup> Justice Bradley was not convinced by this argument. He said: "I dissent from the judgment of the court in this case. In my opinion, the writ of habeas corpus was properly issued, and the prisoner, Mahon, should have been discharged and permitted to return to West Virginia. He was kidnapped and carried into Kentucky in plain violation of the Constitution of the United States, and is detained there in continued violation thereof. It is true, he is charged with having committed a crime in Kentucky. But the Constitution provides a peaceable remedy for procuring the surrender of per-

In *Pettibone v. Nichols*<sup>27</sup> the court held that because the surrendered one had been given no opportunity at the time of his arrest to test in the courts of the surrendering State the legality of the extradition, no Federal right had been violated. "That he had no reasonable opportunity to present these facts before being taken from Colorado," said the court, "constitutes no legal reason why he should be discharged from the custody of the Idaho authorities. No obligation was imposed by the Constitution or laws of the United States upon the agent of Idaho to so time the arrest of the petitioner, and so conduct his deportation from Colorado as to afford him a convenient opportunity before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable, under the act of Congress, to be conveyed to Idaho for trial there."

In this case it was decided also that the fact that the illegal abduction

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sons charged with crime and fleeing into another State. This provision of the Constitution has two objects; the procuring possession of the offender, and the prevention of irritation between the States, which might arise from giving asylum to each other's criminals, and from violently invading each other's territory to capture them. It clearly implies that there shall be no resort to force for this purpose. The Constitution has abrogated, and the States have surrendered, all right to obtain redress from each other by force. The Constitution was made to 'establish justice' and 'insure domestic tranquillity;' and to attain this end as between the States themselves, the judicial power was extended 'to controversies between two or more States,' and they were enjoined to deliver up to each other fugitives from justice when demanded, and even fugitives from service. This manifest care to provide peaceable means of redress between them is utterly irreconcilable with any right to redress themselves by force and violence; and, of course, what is unconstitutional for the States is unconstitutional for their citizens. . . . A requisition would not apply. That is provided for by the extradition of fugitives from justice. It would apply for the delivery up of the kidnappers, but not for the restoration of their victim. It is a special constitutional remedy, addressed by the executive of one State to the executive of another, imposing a constitutional duty of extradition when properly made in a proper case. But the present case is a different one. It is not the surrender of a fugitive from justice which is sought, but the surrender of a citizen unconstitutionally abducted and held in custody. There must be some remedy for such a wrong. It cannot be that the States, in surrendering their right of obtaining redress by military force and reprisals, have no remedy whatever. It was suggested by the counsel that the State of West Virginia might sue the State of Kentucky for damages. This suggestion could not have been seriously made. No; the remedy adopted was the proper one. Habeas corpus is not only the proper legal remedy, but a most salutary one. It is calculated to allay strife and irritation between the States by securing a judicial and peaceful decision of the controversy."

In *Ker v. Illinois* (119 U. S. 436) the plaintiff urged that in violation of law he had been seized in a foreign country and forcibly brought against his will into the United States, in violation of a treaty between the United States and the foreign country, and in violation of the Fourteenth Amendment. The court held, in a unanimous opinion, that notwithstanding the illegal methods pursued in bringing the accused within the State, there had been no violation of a Federal right.

<sup>27</sup> 203 U. S. 192.

from the State was by persons acting under the authority of that State did not take the case out of the operation of the doctrine laid down in the Mahon case.<sup>28</sup>

**§ 168. Trial for Offences Other Than Those for Which Extradited.**

In *United States v. Rauscher*<sup>29</sup> was considered the question whether a fugitive extradited from a foreign country in pursuance of a treaty between that country and the United States covering the crime charged, could, after coming into the custody of the United States, be tried upon another minor offence not covered by the treaty. The court held that he could not be.<sup>30</sup>

In *Lascelles v. Georgia*,<sup>31</sup> however, it was held that, as to fugitives from one State of the Union to another, this may be done. "The fallacy of the argument [that this may not be done]," said the court, "lies in the assumption that the States of the Union occupy toward each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the General Government stands toward independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the State to which he may flee some state or personal right to protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition. . . . The sole object of the provision of the Constitution and act of Congress to carry it into effect is to secure the surrender of persons accused of crime who have fled from the justice of a State, whose laws they are charged with violating. Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein."<sup>32</sup>

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<sup>28</sup> Justice McKenna dissented as to this.

<sup>29</sup> 119 U. S. 407.

<sup>30</sup> Chief Justice Waite dissented. See also *Cosgrove v. Winney* (174 U. S. 64).

<sup>31</sup> 148 U. S. 537.

<sup>32</sup> The opinion continued: "The case of *United States v. Rauscher* has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty which specified the offenses that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can

**§ 169. Extradition by the States of the Union to Foreign States.**

In 1840 the Supreme Court was called upon to pass upon the question whether it lies within the constitutional power of the individual States of the Union to surrender fugitives from justice to a foreign government.<sup>33</sup> This point the court found so difficult to decide that, after holding it under advisement for a long time, it divided equally and was, therefore, unable to render an opinion as the opinion of the court, though, according to its practice in such cases, it affirmed the decision of the court below. Taney in his individual opinion took the ground that the surrender of fugitives from justice is a matter that properly falls within the general field of international relations, and that the control of this field being exclusively vested in the Federal Government, the States are absolutely excluded therefrom, and, therefore, cannot, constitutionally, exercise the right of extraditing to foreign countries fugitives from them to their own territories. "The power in question," he declared, "from its nature, cannot be a concurrent one, to be exercised both by the States and the General Government. It must belong, exclusively, to the one or the other." With Taney agreed Story, McLean, and Wayne. Thompson, Barber and Catron, however, in their opinions, took the view, that the action of the governor of Vermont was not subject to examination upon the part of the Federal court, because there then existed no treaty between the United States and the country to which the prisoner was to be extradited, which the governor's action could be said to violate. Baldwin in a separate opinion sustained the power of the State upon the ground that it was a legitimate exercise of its police power to obtain riddance of an undesirable inhabitant.

It would seem that the law upon this point remained in this unsettled state until 1886 when, in the case of *United States v. Rauscher*<sup>34</sup> the Supreme Court declared, without dissent, that "there can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power

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be regarded as establishing any compact between the States of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description punishable by the laws of the State where the forbidden acts are committed. It is questionable whether the States could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. But it is settled by the decision of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence or by abuse of legal process." Citing *Ker v. Illinois* (119 U. S. 436); *Mahon v. Justice* (127 U. S. 700); *Cook v. Hart* (146 U. S. 183).

<sup>33</sup> *Holmes v. Jennison* (14 Pet. 540).

<sup>34</sup> 119 U. S. 407.



exercised by the governor of Vermont is a part of the foreign intercourse of this country which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the States to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the State, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiations between a State of this Union and a foreign government."

This question may probably be now considered definitely settled, but it is interesting to observe that the declaration determining it was, after all, a pure *dictum*.

#### § 170. Fugitive Slaves.

The same section of Article IV which provides for the extradition of fugitives from justice, provides that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This clause is practically obsolete.<sup>35</sup> An elaborate examination of the obligations imposed upon the States, and of

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<sup>35</sup> The question has been raised whether, since the adoption of the Thirteenth Amendment, the fugitive slave clause of the Constitution has become completely obsolete. It is generally so held, but possibly not correctly so. The clause in question, it will be observed, does not employ the word slaves. Its words are sufficiently broad to make the clause cover not only slaves but minor apprentices and possibly others owing services under contract. Indeed, Charles Sumner in a debate in the United States Senate in 1864 maintained that, properly interpreted, it applied only to such and not to slaves at all. (Congressional Globe, 1st Sess., 38th Cong., Pt. II, pp. 1711, 1750.) The Thirteenth Amendment abolishes not only slavery but all "involuntary servitude," and it has been held that this renders illegal an attempt to compel, upon the part of adults, the performance of any personal services, whether provided for by contract and already compensated for, or not. Of course, however, damages for breach of contract to render personal services, may be awarded. But this does not render illegal State laws compelling the performance of personal services on the part of minor apprentices, and if this be so, it would seem that a minor apprentice escaping from a State where his services may be compelled, into another State, under a proper law for the purpose, be claimed and removed to the State from which he fled. The subject of peonage will be considered in a later chapter.

the extent of concurrent legislative power in the premises is found in *Prigg v. Pennsylvania*.<sup>36</sup>

The provision of the Constitution that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808" has, of course, become obsolete.

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<sup>36</sup> 16 Pet. 539. For an able discussion of the constitutionality of the Federal Fugitive Slave Act of 1850, see the article by Professor Allen Johnson, "The Constitutionality of the Fugitive Slave Acts" in *Yale Law Journal*, December, 1921.



## CHAPTER XV

### AGREEMENTS BETWEEN THE STATES AND BETWEEN THE STATES AND FOREIGN POWERS

#### § 171. Individual States and Foreign Powers.

As is elsewhere shown,<sup>1</sup> the control of foreign relations is exclusively vested in the Federal Government. From this it necessarily follows that the States have no authority to enter into any political relations with foreign Powers. From what is, therefore, an excess of caution the Constitution expressly declares that "no State shall enter into any treaty, alliance, or confederation."<sup>2</sup> However, in a later clause<sup>3</sup> of the same section the possibility of the States entering into direct relations with foreign Powers, provided the consent of Congress is obtained, is recognized, at least as regards certain but undefined agreements or compacts. The constitutional provision reads: "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign Power."

There have been few instances in which the States have sought, with or without the consent of Congress, to enter into agreements with foreign States, and there are therefore few cases in which the courts have been called upon to determine what kinds of agreements may thus, with congressional approval, be entered into between the States and foreign States. However, as will presently be seen, there have been many instances in which the States have entered into agreements with one another, and from the judicial decisions arising thereunder, it is clear that these permissible agreements or compacts do not include any that are of political significance.

As regards agreements with foreign Powers, the most interesting case is that of *Holmes v. Jennison*.<sup>4</sup> In this case the question was whether the State of Vermont might, without having obtained the prior consent of Congress, recognize extradition proceedings of the dominion of Canada and extradite thereunder a fugitive from the justice of Canada. The Supreme Court divided equally upon the case as presented by the writ of error, and, therefore, the writ was dismissed without passing squarely upon this question, but, from the opinions rendered, it was fairly evident that a majority of the court were of the opinion that, because of the constitutional prohibition of Section 10 of Article 1 the State had no such power. In the course of his opinion Chief Justice Taney, after quoting

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<sup>1</sup> Chapter XXXIII.

<sup>2</sup> Art. I, Sec. 10, Cl. 1.

<sup>3</sup> Clause 3.

<sup>4</sup> 14 Pet. 540.

several paragraphs from Vattel, said: "After reading these extracts, we can be at no loss to comprehend the intention of the framers of the Constitution in using all these words, 'treaty,' 'compact,' 'agreement.' The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, these terms 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms, and that they anxiously desired to cut off all connection or communication between a State and a foreign Power: and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification, and so apply it as to prohibit every agreement, written or verbal, formed or unformed, positive or implied, by the mutual understanding of the parties. Neither is it necessary in order to bring the case within this prohibition, that the agreement should be for the mutual delivery of all fugitives from justice, or for a particular class of fugitives. It is sufficient, if there is an agreement to deliver Holmes. For the prohibition in the Constitution applies not only to a continuing agreement embracing classes of cases, or a succession of cases, but to any agreement whatever."

§ 172. **Compacts Between the States.**

There has never been any doubt but that, when congressional consent is given, the several States of the American Union may enter into agreements and compacts with one another, so long as their effect is not to create what in political language is termed an "alliance" or "confederation."<sup>5</sup> Not only this, it has been held that there are a variety of subjects concerning which the several States may enter into agreements with one another without the necessity of obtaining the consent of Congress. Upon this point, in *Virginia v. Tennessee*,<sup>6</sup> the Supreme Court said: "There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through the State in that way. If the

<sup>5</sup> *Green v. Biddle* (8 Wh. 1); *Poole v. Fleeger* (11 Pet. 185).

<sup>6</sup> 148 U. S. 503.

bordering line of the two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in removing the cause of the disease. So, in the case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session."

"If, then," the court asked, "the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?" "Looking at the clause in which the terms 'compact' or 'agreement' appear," answered the court, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."<sup>7</sup>

The court continued: "Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining State. It is a legislative declaration which the State and individuals affected by the recognized boundary line may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual agreements may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run to cut off an important and valuable portion

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<sup>7</sup> The court went on to quote with approval from Story's *Commentaries upon the Constitution*, Sec. 1403.

of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterward, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State, it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the States to the General Government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other."<sup>8</sup>

In *Dover v. Portsmouth Bridge*,<sup>9</sup> the Supreme Court of New Hampshire held that the State might, without necessity of obtaining prior congressional consent, enter into an arrangement with the State of Maine, made operative by concurrent legislation upon the part of the two States, for the construction of a bridge over a boundary river. Similar coöperative action between two States with reference to the construction of a railroad was upheld by the Supreme Court of Georgia in *Union Branch Ry. Co. v. East Tennessee and Georgia Ry. Co.*<sup>10</sup>

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<sup>8</sup> The opinion continued: "The Constitution does not state when the consent of Congress shall be given, whether it shall precede or follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as to where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the Act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced."

<sup>9</sup> 17 N. H. 200.

<sup>10</sup> 14 Ga. 327. For a list of acts of Congress giving consent to agreements between States see the article by Chief Justice Bruce of the Supreme Court of North Dakota, "The Compacts and Agreements of States with One Another and with Foreign Powers," 2 *Minnesota Law Review*, 500. See also the article, "The Compact Clause of the Constitution: A Study in Interstate Adjustments" by Felix Frankfurter and James M. Landis, 34 *Yale Law Journal*, 685.

## CHAPTER XVI

### COMPACTS BETWEEN THE STATES AND THE UNITED STATES

Closely connected with the question of compacts of the States, *inter se*, is that of compacts between the individual States and the United States.

Of compacts of this character which have been entered into, the greater number have been made at the time the States in question have been admitted as States into the Union, and which have attempted to place such States under restrictions not directly deducible from the Federal Constitution, and therefore, restrictions not resting upon the other States. To this extent they have been in violation of the general principle of the equality of the States. This principle, it may be said, is not expressly stated in the Federal Constitution, but would seem to be implied in the general nature of that instrument.<sup>1</sup>

The Constitution, without distinguishing between the original and new States, defines the political privileges which the States are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved "to the States." From this it almost irresistibly follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have their constitutional competences less than those of their sister States. According to this, then, though Congress may exact of Territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other Commonwealths enjoy.

#### § 173. Equality of the States.

The principle of the equality of the States had its origin before the adoption of the Constitution itself. In the acts of cession by the several States through which the old Confederacy obtained the control of the Northwest Territory, it was provided that from this vast area new States should, from time to time, be organized, which should be admitted to the Confederacy, with the same sovereign rights enjoyed by other States.

The famous Northwest Ordinance of 1787, reenacted by the Congress of the United States in 1789, after laying down the general conditions upon which statehood was to be accorded, declared that the States, so admitted, should be "on an equal footing with the original States in all respects whatever."

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<sup>1</sup> See article "Are the States Equal under the Constitution?" by W. A. Dunning, in 3 *Political Science Quarterly*, 425.

Notwithstanding, however, this requirement of equality, Congress at an early date began the practice of exacting from would-be States various promises by the terms of which they were to hold themselves bound after their admission to the Union and until Congress should release them. Thus, for example, beginning in 1802 with Ohio, the first State formed from the Northwest Territory, it was demanded by Congress that that State, when admitted, should pass an ordinance, irrevocable without the consent of Congress, not to tax for five years all public lands sold by the United States; and a requirement substantially similar was demanded of many of the States later formed. When Missouri was admitted in 1821 it was required to declare that its Constitution should never be so construed as to permit its legislature to pass a law excluding citizens of other States from the enjoyment of any of the privileges and immunities granted them by the Federal Constitution.<sup>2</sup>

Beginning with the admission of Nevada in 1864, the promises exacted of Territories seeking admission as States assumed a more political character. Of Nevada it was required that her Constitution should harmonize with the Declaration of Independence and that the right to vote should not be denied persons on account of their color. Of Nebraska, admitted in 1867, it was demanded that there should be no denial of the franchise or *any other right on account of race or color, Indians excepted*. Of the States that had attempted secession, still more radical were the requirements precedent to the granting to them of permission again to enjoy the other rights which they had for the time being forfeited. Of all of them it was required that there should be, by their laws, no denial of the right to vote except for crime; and of three, that negroes should not be disqualified from holding office, or be discriminated against in the matter of school privileges.<sup>3</sup> Utah, when admitted as a State in 1894, was required by Congress by the Enabling Act to make "by ordinance irrevocable without the consent of the United States and the people of the United States, provisions for perfect religious toleration and for the maintenance of public schools free from sectarian control; and that polygamous or plural marriages are forever abolished." Finally, when the State of Oklahoma was admitted to the Union, Congress provided in its Enabling Act of 1906 that the capital city of the State should be temporarily at Guthrie, and that it should not be changed therefrom, prior to 1913.

It would seem that as regards the enforceability of these contracts, a distinction is to be made between those that attempt to place the State

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<sup>2</sup> A superfluous requirement, for with or without such a promise, a State is, and was then, constitutionally unable to deprive anyone of the rights guaranteed by the Federal Constitution.

<sup>3</sup> By the adoption of the Fourteenth and Fifteenth Amendments, some of these limitations have been made applicable to all the States and thus an equality, as to them, created.

under political restrictions not imposed upon all the States of the Union by the Federal Constitution, and those which seek the future regulation of private, proprietary interests.

The first class of these agreements the Supreme Court has repeatedly held are not enforceable against the State after it has been admitted into the Union.

In *Pollard v. Hagen* <sup>4</sup> the court held that a stipulation of an act of Congress passed for the admission of the State of Alabama into the Union that "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost or toll therefor, imposed by said State" did not give to the United States any greater control of the navigable waters of that State than was possessed by the Federal Government over the waters of any other State.<sup>5</sup>

In *Escanaba v. Lake Michigan Transportation Co.*<sup>6</sup> the court declared, relative to certain limitations placed upon the governing powers of Illinois while in a territorial condition: "Whatever the limitations upon her powers as a government while in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them."

And in *Boln v. Nebraska* <sup>7</sup> it was declared: "This court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belongs to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands upon an equal footing with the original States in all respects whatever."

Notwithstanding the condition of the Enabling Act of Congress which the State had accepted and acted under at the time of its admission to the Union the Oklahoma legislature in 1910 provided for the immediate removal of the State capital from Guthrie to Oklahoma. The constitutionality of this act was upheld by the Supreme Court of the State, and this judgment, upon writ of error, was affirmed by the Supreme Court of the United States.<sup>8</sup>

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<sup>4</sup> 3 How. 212.

<sup>5</sup> Cf. *Strader v. Graham* (10 How. 82); *Weber v. Harbor Commissioners* (18 Wall. 57); *Sands v. Manistee River Imp. Co.* (123 U. S. 288); *Shively v. Bowlby* (152 U. S. 1).

<sup>6</sup> 107 U. S. 678.

<sup>7</sup> 176 U. S. 83.

<sup>8</sup> *Coyle v. Smith* (220 U. S. 559).

That court, in its opinion, speaking of the power of Congress to admit new States into the Union, said:

"But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit States.' . . .

" 'This Union' was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. . . . As to requirements in such enabling acts as relate only to the contents of the Constitution for the proposed new State, little need to be said. The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic law of a new State at the time of admission shall be such as to meet its approval. A Constitution thus supervised by Congress would, after all, be a Constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a State Constitution, and not that of an act of Congress. It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Iron Bridge Co., v. Hatch*, 125 U. S. 1; *Pollard v. Hagan*, 3 How. 212. No such question is presented here."

In the next year after the *Coyle* case, the court, in *Ex parte Webb*,<sup>9</sup> held that the reservation in the Oklahoma Enabling Act of Congress with regard to the authority of Congress to legislate in the future respecting Indians residing in the new State was one which the State was obliged to respect in so far as it was relied upon by Congress to legitimate legislation falling within the general constitutional power of Congress to regulate commerce with the Indian tribes. The court, however, added the caution: "It is not our purpose to qualify the doctrine established by repeated decisions of this court that the admission of a new State into the Union on an equal footing with the original States imports an equality of power over internal affairs."

<sup>9</sup> 225 U. S. 663.



In *Virginia v. West Virginia*<sup>10</sup> there is the *obiter* statement that when Congress has given its consent to a compact between States of the Union and thereby made it operative, Congress thereby obtains a legislative authority to provide the means for its enforcement.

**§ 174. Contracts Regarding Proprietary Interests.**

Turning now to a consideration of the continued validity and enforceability of compacts between the States and General Government with reference to proprietary interests, one finds the case of *Stearns v. Minnesota*<sup>11</sup> most instructive and illuminating. That case involved the construction and application of an agreement made by the State with the United States at the time of its admission to the Union, with reference to public lands, within its boundaries, owned by the United States. The court in its opinion said: "That these provisions of the Enabling Act and the Constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between the State and the Nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or to the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the Nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the Nation. That a State and the Nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history. . . . We are of opinion that there was a valid contract made with these companies in respect to the taxation of these lands—a contract which it was beyond the power of the State to impair; that this subsequent legislation does impair that contract and cannot, therefore, be sustained."

**§ 175. Suits between States.**

This subject will be treated in connection with the Judicial Power of the United States.<sup>12</sup>

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<sup>10</sup> 246 U. S. 565.

<sup>11</sup> 179 U. S. 223.

<sup>12</sup> See Chapter LXXV.

## CHAPTER XVII

### THE PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES: STATUS OF ALIENS

#### § 176. Territorial Sovereignty.

By international law and by the public law of all civilized States the legal jurisdiction of a State is generally recognized to extend over all persons for the time being within the areas under its *de facto* control. The only exceptions, if exceptions they be, are those coming within the principle of extraterritoriality. A State has jurisdiction over, not only its native-born and naturalized subjects, but all the subjects of other States permanently, or, at any given time, temporarily resident, within its borders.

Nowhere, perhaps, has this general constitutional principle been better stated than by Marshall in the great case of *The Exchange*,<sup>1</sup> decided in 1812. In the opinion rendered in this case, the Chief Justice, after pointing out that the jurisdiction of a State within its own territory is necessarily exclusive as well as absolute, goes to show that the exceptions to this principle, generally recognized in practice, are themselves founded upon the will of the State recognizing them. Thus the so-called doctrine of extraterritoriality, though often spoken of as a fiction, namely, that the diplomatic representatives and their establishments, and public ships of war, are upon, or are parts of, the territory of the States to which they belong, is not a necessary fiction. Such immunity from local jurisdiction as exists is due to the consent of the local State. That is to say, it is by an exercise of the jurisdiction of that State that these persons are exempted from the operation, though entitled to the protection, of the local law.

#### § 177. De Facto Control.

The authority of States over districts and their inhabitants temporarily subject to its *de facto* control, will be considered in another chapter. At this place it will be sufficient to quote the opinion in *United States v. Rice*<sup>2</sup> in which, with reference to the status of the port of Castine, Maine, at the time it was in the possession of the British authorities during the War of 1812, the Supreme Court, speaking through Justice Story, said: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory

<sup>1</sup> 7 Cr. 116.

<sup>2</sup> 4 Wh. 246.

was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for, where there is no protection or allegiance or sovereignty, there can be no claim to obedience."

Upon this same point, Chancellor Kent in his *Commentaries* says: "If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a State, while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law that during such hostile occupation of a territory, and the parents adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered." And, he adds, there is no reason why the same principles should not apply to the United States.<sup>3</sup>

#### § 178. Status of Aliens.

As regards the status of aliens, that is, subjects of other States, who are temporarily or permanently domiciled in a State, it may be said that the fact that they are within its territorial limits makes them, in a broad constitutional sense, members of that State, and, therefore, subject to the authority of its laws, though they still remain the subjects or citizens of their native States. In fact, being under the protection of the State where they are, they owe an allegiance to it according to the maxim *protectio trahit subjectionem, et subjectio protectionem*. Webster, when Secretary of State, in his report on Thrasher's case in 1851, declared: "Independently of a residence with intention to continue such residence, independently of the taking of any oath of allegiance, or of renouncing any former allegiance, it is well known, that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty speculations."<sup>4</sup>

This principle thus stated by Webster has been several times quoted and approved by the Supreme Court.<sup>5</sup>

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<sup>3</sup> 6th ed. II, 42.

<sup>4</sup> Webster's Works, VI, 526.

<sup>5</sup> *United States v. Carlisle* (16 Wall. 147); *United States v. Wong Kim Ark* (169 U. S. 649).

## § 179. Double Allegiance.

There is no objection to predicating the existence of this double allegiance, for, despite the fact that modern sovereignty is generally spoken of as territorial, it is, in fact, personal, and imports a personal relationship between the sovereign political person—the State—and its political inferiors, its subjects. Sovereignty in truth is a purely legal concept and exists only within the field of constitutional law. International relations, the relations between States, are not legal in character, and international laws, so called, are not laws at all in a strict positive sense. They are not commands from a legal superior to a legal inferior, but are regulations governing the conduct of political equals. Within this general international field the authority or jurisdiction of governments is strictly territorial—over each territorial district there is a particular *de facto* government recognized by the various States to have a right, based upon actual power, to exercise political control, and, correspondingly, is held by them responsible for whatever occurs within such districts. Internationally speaking, therefore, jurisdiction is territorial and exclusive. Over any given territory, one, and only one, governing body is recognized to have legitimate authority. But sovereignty, denoting, as said, legal supremacy, a personal relationship, as predicated upon a legal subjection or allegiance of individuals to a legal superior, is not territorial; and there is thus no inherent difficulty in a sovereign claiming legal authority over individuals located outside of the limits of the territory conceded by other nations to belong to it; or of two or more States claiming at the same time, under the operation of their respective municipal laws, the allegiance of the same individual, as for instance, as we shall presently see, when one State naturalizes the subject of a State whose municipal law does not recognize the right of expatriation.

From the viewpoint of international relations, as we have just seen, the law of one State is not permitted by other States to operate outside of the territorial limits of the State which promulgates it, and, therefore, though claiming a legal authority over an individual outside of such limits, a State will not be permitted by other States to exercise it against the consent of the State within whose limits the individual is situated. But that does not render impossible the existence of or invalidate such a claim, for when, if ever, such an individual is apprehended within the territory of the State claiming authority over him he may be held responsible for acts committed while abroad. And also, as still more plainly showing the personal and non-territorial character of allegiance and sovereignty is the principle universally recognized both in municipal and international law, that a citizen of a State is in many cases entitled to the protection of that State while abroad. Thus he does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, nor does he necessarily escape from beneath its law or cease to be entitled to its protection.

**§ 180. Status of Aliens in the United States.**

In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, and over its own citizens wherever they may be. In the exercise, however, of this authority over persons within its territorial limits who are claimed as citizens by other States, that is, over resident aliens, or naturalized citizens whose native States do not recognize the right of expatriation, this legal power, though not subject to legal limitation, is actually subject to certain limitations which international custom has created. Thus each State demands that its subjects, when abroad, shall receive protection in life and property, and that they be not unduly discriminated against by the foreign State in which they may happen to be. Also States do not permit the foreign States to require from their subjects the performance of duties that properly may be required only of citizens. Resident aliens may indeed be required to lend their assistance, by service in the militia and police forces, or in a *posse comitatus*, to put down domestic disorder; for, enjoying the protection of the local law, they may fairly be required to aid in overcoming resistance to its enforcement. But they may not be compelled to serve in the national military forces in cases of public war.

During the Civil War, Great Britain did not object to the enrollment in the local militia of her citizens domiciled in the United States; and in the case of one Scott, who had declared his intention of becoming an American citizen, refused to take any steps to prevent his enrollment in the army in the field. Great Britain, however, emphatically protested to the government of the Southern Confederacy against the conscription of her subjects in the Southern States. Several of the leading European Powers protested against the attempt on the part of the United States to conscript into its armies domiciled aliens who had declared their intention of becoming American citizens, whereupon the United States granted to such aliens sixty-five days in which to leave the country, upon failure to do which they were held liable to conscription; and this arrangement was acquiesced in by the Powers concerned, though not without complaint that the principles of international comity were being violated. When, in 1873, the State of Nicaragua attempted by an amendment to her Constitution to make foreigners liable to military and other public services, protests from the American Minister were made, in consequence of which the project was abandoned.

**§ 181. Domiciled Aliens.**

A distinction is made in practically all countries between domiciled and non-domiciled aliens, with reference to the legal burdens that may be imposed upon them, and the civil and political rights that they may enjoy.

An alien becomes domiciled in a particular place when he takes up residence there with an intention to remain for an indefinite time (*animo*

*manendi*). When so domiciled, all matters other than political, which relate to his personal status, are regulated by the *lex domicilii*. Thus the local law governs his power to enter into contracts, regulates succession to personal property, and the validity of wills with reference thereto, and, in the United States, England, and many of her dependencies, determines the validity of marriages. In France, and some other countries, however, this last subject is held regulated by the individual's national law wherever he may be domiciled. Thus, while the marriage in the United States of a Frenchman domiciled in the United States is held valid by the United States law if its provisions governing marriages are satisfied, it will not be held valid in France, unless the requirements of the French law are also satisfied.

Domicile is immediately fixed when residence is taken up with the intent to remain for an indefinite length of time. Thus, for example, in 1781 when the English captured from the Dutch the island of St. Eustatius, a native-born English citizen who had arrived at the island but a few hours before with the intention of residing there for an indefinite length of time, was held to be domiciled there and his property subject to the same liabilities as those of the other residents of the place. The same doctrine was applied by the Supreme Court of the United States in the case of *The Venus*.<sup>6</sup> In this case with reference to the status of such a domiciled alien in time of war the court said: "The next question is, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably refuses, when required by his country, to return. The same rule as to property engaged in the commerce of the enemy applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

"But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning

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<sup>6</sup> 8 Cr. 253.

his back on the country in which he resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*."

#### § 182. Aliens Not Domiciled.

An alien passing through the United States, or for any purpose only temporarily in the country, is held fully subject to local criminal law. He is also able to enter into civil contracts which may be enforced against him to the extent of any property that he may have within the United States.

#### § 183. Exclusion of Aliens.

All the countries have, according to the principles of international law, the right to determine for themselves whether or not they will admit aliens within their borders, or whether they will admit some and exclude others. Furthermore, after admission, aliens, whether domiciled or not, may remain only so long as the State where they are sees fit to permit them to do so. The arbitrary, oppressive or opprobrious exercise of these rights may give rise to just grounds of complaint upon the part of States whose subjects are thereby injured or discriminated against, but the existence of the right of an independent State to determine for itself whom it will receive or allow to remain within its borders cannot be questioned.

In *United States ex rel. Turner v. Williams*<sup>7</sup> the court said: "Whether rested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us [of March 3, 1903, for the exclusion and deportation of alien anarchists] is not open to constitutional objection."<sup>8</sup>

The right of the United States, from both the international and constitutional points of view to prohibit entrance within its borders to such aliens as it may deem undesirable additions to its population, has been examined and upheld in numerous cases, most of them dealing with the exclusion of the Chinese.

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<sup>7</sup> 194 U. S. 279.

<sup>8</sup> The first ground mentioned, namely, that of inherent sovereignty, is not a good ground (see *ante*, in this treatise, Section 58), unless it be meant that the United States has been given, by the Constitution, that plenary power with reference to matters of international relations which all sovereign States possess, and that, therefore, from this general grant of power may be deduced a "resulting" right to control the admission to, or the expulsion of aliens from, the United States.

In the Chinese Exclusion case,<sup>9</sup> decided in 1887, the Supreme Court said: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interest or dignity may demand; and there lies its only remedy."

In this case the court held that so essential to a sovereign State is this right of excluding undesired aliens, the State may not be prevented, even by treaty, from exercising it at its own discretion. Thus, in holding valid an act of Congress the terms of which were in violation of a treaty previously entered into by this country with China, the court said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained previous to

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<sup>9</sup> *Sub nom.* Chae Chan Ping v. United States (130 U. S. 581).



the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground for complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject."

This power of exclusion, as the Supreme Court has, in a line of cases, held, may, by congressional direction, be exercised through executive officers without judicial intervention.<sup>10</sup>

**§ 184. Hindus, British Indians, Asiatics.**

By act of February 5, 1917,<sup>11</sup> in the section enumerating the classes to be excluded from entering the United States, it is provided: "Unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situated south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fifteenth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridian of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north. . . . The provision next foregoing, however, shall not apply to persons of the following status or occupations: Government officers, ministers or religious teachers, missionaries, lawyers, students, authors, artists, merchants, and travelers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States, but such persons or their legal wives or foreign born children who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section nineteen of this Act."

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<sup>10</sup> *Ekiu v. United States* (142 U. S. 651); *Fong Yue Ting v. United States* (149 U. S. 698); *Lem Moon Sing v. United States* (158 U. S. 538); *Turner v. Williams* (194 U. S. 279); *United States v. Ju Toy* (198 U. S. 253); *Chin Low v. United States* (208 U. S. 8).

<sup>11</sup> 39 Stat. at L. 874.

§ 185. Chinese Laborers.

It should be observed that there are Federal statutes with reference to the exclusion from the United States of Chinese laborers which are special in character, and were passed in pursuance of treaties between the United States and China, and which therefore are not to be grouped under the immigration acts as regards the procedure and remedies under them. In *United States v. Woo Jan*,<sup>12</sup> the court said: "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation and it was provided by the treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them by section 43."<sup>13</sup>

§ 186. Expulsion: Deportation of Aliens.

As we have seen from the foregoing quotations, the same principles that support, constitutionally, the right of the United States to exclude aliens, support the right to expel them when occasion demands. Bonfils states the international doctrine as follows: "A State has the right to expel from its territory aliens, individually or collectively, unless treaty provisions stand in the way. . . . In ancient times, collective expulsion was much practised. In modern times it has been resorted to only in case of war. Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: The public interests of the State. Bluntschli wished to deny the States the right of expulsion, but he was obliged to acknowledge that aliens might be expelled by a single administrative measure. (French law of December 2, 1849, arts. 7 & 8—Law of

<sup>12</sup> 245 U. S. 552.

<sup>13</sup> Sec. 43. "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

Article I of the treaty provided that whenever in the opinion of the United States the coming of Chinese laborers to the United States or their residence therein might affect the interests of the United States, it was agreed that the United States might regulate, limit or suspend such coming or residence, but not absolutely prohibit it, and that the limitation should be reasonable and apply only to laborers, other classes not being included in the limitation. Article II of the treaty is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come at their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." 22 Stat. at L. 827.

Oct. 19, 1797, art. 7.) An arbitrary expulsion may nevertheless give rise to a diplomatic claim."<sup>14</sup>

In *Keller v. United States*,<sup>15</sup> the Supreme Court held unconstitutional the provision of the act of Congress of February 20, 1907,<sup>16</sup> that whoever should keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, should be guilty of a felony. In this case the defendants had had nothing whatever to do with the importation of the woman involved. The court said: "It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires or the testimony shows she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power." This police power, the court went on to declare, belongs exclusively to the States.

It would seem to be clear that, for the purpose of excluding aliens from the country, Congress may retain control over those who have entered for a period long enough, and sufficient in character, to make certain whether they were, in fact, entitled to enter under the existing immigration laws.<sup>17</sup>

Deportation proceedings are not criminal in character, and, therefore, do not have to meet the constitutional requirements of criminal proceedings. In *Bugajewitz v. Adams*<sup>18</sup> the court said: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination of facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident."<sup>19</sup> . . . The

<sup>14</sup> *Manuel du Droit International Public*, 442; Moore, *Digest of International Law*, Sec. 550.

<sup>15</sup> 213 U. S. 138.

<sup>16</sup> 34 Stat. L. at L. 898.

<sup>17</sup> *Yamagata v. Fisher* (189 U. S. 76); *Pearson v. Williams* (202 U. S. 281); *Jakonaite v. Wolf* (226 U. S. 272); *Bugajewitz v. Adams* (228 U. S. 585); *Lapina v. Williams* (232 U. S. 78).

<sup>18</sup> 228 U. S. 585.

<sup>19</sup> Citing *Fong Yue Ting v. United States* (149 U. S. 698); *Wong Wing v. United States* (163 U. S. 228); *Zakonaite v. Wolf* (226 U. S. 272); *Tiaco v. Forbes* (228 U. S. 549, *ante*, 585).

prohibition of *ex post facto* laws in Article I, section 9, has no application."<sup>20</sup>

**§ 187. Citizens of the United States: Persons Claiming to Be.**

The extent to which conclusive effect may constitutionally be granted to the determination of administrative officials with reference to the exclusion or expulsion of aliens will receive consideration in a later chapter.<sup>21</sup> It is, however, proper to say here that while executive or administrative, as distinguished from judicial, proceedings are held constitutionally adequate as regards aliens, the situation is a different one when the party desiring to enter claims, and shows that his claim is not a frivolous one, to be a citizen of the United States. In such a case, a writ will be allowed by means of which the party may obtain a judicial determination of his claim to citizenship. This is very clearly determined in the important case of *Ng Fung Ho v. White*.<sup>22</sup> In that case, Mr. Justice Brandeis, speaking for a unanimous court, said: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status [citing cases]. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then, obviously, deportation of a resident may follow upon a purely executive order, whatever his race or place of birth. For where there is jurisdiction, a finding of fact by the executive department is conclusive;<sup>23</sup> and courts have no power to interfere unless there was either denial of a fair hearing,<sup>24</sup> or the finding was not supported by the evidence,<sup>25</sup> or there was an application of an erroneous rule of law.<sup>26</sup> To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*.<sup>27</sup> It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Eighth Amendment affords protection in its guaranty of due process of law. The difference

<sup>20</sup> *Johnnassen v. United States* (225 U. S. 227).

<sup>21</sup> §§ 1101, 1102.

<sup>22</sup> 259 U. S. 276.

<sup>23</sup> *United States v. Ju Toy* (198 U. S. 253).

<sup>24</sup> *Chin Yow v. United States* (208 U. S. 8).

<sup>25</sup> *American School v. McAnnulty* (187 U. S. 94).

<sup>26</sup> *Gegiow v. Uhl* (239 U. S. 3).

<sup>27</sup> 208 U. S. 8.

in security of judicial over administrative action has been adverted by this court."<sup>28</sup>

In *United States v. Tod*<sup>29</sup> the foregoing doctrine was again asserted. The court conceded that the burden of proving alienage rested with the Government, but that the presumption of citizenship was not comparable to the presumption of innocence in a criminal case, and that, in the instant case, the administrative authorities had had sufficient evidence, even if only presumptive in character, to warrant the order of deportation.

### § 188. Protection of the Persons and Property of Aliens.

Aliens are, by the general doctrines of international law, entitled to the same protection of person and property that is enjoyed by the citizens of the State in which they are resident. In all cases, when injured, the same means of redress that are open to citizens must be given them. But they are, of international right, entitled to no special privileges in these respects.<sup>30</sup>

In a number of cases the United States Government has been called upon by foreign governments to furnish pecuniary and other redress to resident aliens who have been illegally killed, injured, or their property destroyed. These claims have in practically all cases arisen out of injuries received at the hands of mobs moved by feelings of animosity against the injured because of their race. Thus claims of this sort were advanced after the New Orleans Spanish Riots of 1851, the Denver Chinese Riot in 1880, the Chinese Riot in 1885 at Rock Springs in the Territory of Wyoming, the Chinese Riot at Seattle in the same year, and the lynching of certain Italians at New Orleans in 1891.

In a number of cases the United States, *ex gratia*, has paid indemnities to the injured or to their families, but in no case has acknowledged that, under the principles of international law, it was obligated to do so. As regards the punishment of those who have committed the assaults, the United States has called attention to the fact that this is a matter for the local authorities where the assaults occur. Had, of course, any public officials of the United States participated, as such, in the assaults, or sanctioned them, or, had the United States refused to the injured aliens, or failed to provide them with, the protection which was accorded to American citizens, it was admitted that the case would have been different, and international responsibility would have been incurred.

As a result of the McLeod incident, described in section 110 of this treatise, Congress passed the next year an act providing that the Supreme Court, the Circuit Court, and the District Courts of the United States should

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<sup>28</sup> *United States v. Woo Jan* (245 U. S. 552); *White v. Chin Fong* (253 U. S. 90).

<sup>29</sup> 263 U. S. 149.

<sup>30</sup> See IV Moore, *Digest of International Law*, 534, and authorities there cited.

have the power to issue writs of habeas corpus "in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they being subjects or citizens of a foreign State and domiciled therein, shall be committed or confined, or in custody, under or by any authority of law, or process founded thereon, of the United States, or of any of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission or order or sanction of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."<sup>31</sup>

The constitutionality of this act can scarcely be questioned. In so far as the United States admits, and properly admits, itself to be responsible to foreign States, it has undoubtedly an implied constitutional power to extend its judicial power sufficiently to enable it to discharge the obligations which its international relations may impose upon it.

It will be observed that under the statutory authority conferred by Section 753 the Federal court may, by writs of habeas corpus, obtain possession of, and release persons situated as was McLeod, but it does not give to the Federal courts the power to prevent, or secure the punishment of persons committing, acts of violence or other illegal acts within the States upon aliens. That they should be given this authority because, by such acts, the United States may possibly become responsible to foreign powers has been several times suggested in presidential communications to Congress, and bills providing this have been introduced in that body but never as yet enacted into law. President Harrison in his annual message of December, 1891, referring to the lynching of the Italians at New Orleans, said: "Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this

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<sup>31</sup> 5 Stat. at L., 539. At present, as stated in the Revised Statutes (Sec. 753) the power of the Federal courts to issue writs of habeas corpus is as follows: "Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted, under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."

Several years after the failure to secure the enactment recommended by President Harrison, occurred the lynching of a number of Italians in Louisiana, and this stimulated President McKinley, in his annual messages to Congress of 1899 and 1900, to renew the recommendation. After referring to the fact that to the Federal courts was given jurisdiction of civil suits brought by aliens involving certain sums, President McKinley, in his Message of 1899, said: "If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and the rights of aliens under the settled principles of International Law, no less than under treaty stipulation, in cases of such transcendent wrong-doing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders." Though bills were introduced into Congress to given effect to the President's proposal, none of them was enacted.

In 1906 President Roosevelt, in his annual message, added his recommendation to those of Presidents Harrison and McKinley that Congress should enact laws which would more adequately provide for Federal protection of the treaty rights of aliens. In the course of this Message, and with especial reference to relations with Japan which, at that time, were giving much concern to the United States, Mr. Roosevelt said: "One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give to the National Government sufficiently ample power, through United States courts and by the use of the Army and Navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I, therefore, earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President, acting for the United States Government, which is responsible for our international relations, to enforce the rights of aliens under treaties. There should be no particle of doubt as to the power of the National Government completely to perform and enforce its own obligations to other nations."<sup>32</sup>

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<sup>32</sup> It will be here observed that President Roosevelt seemed to be more concerned that the greater power should be vested in the President to prevent the violation of the treaty rights of aliens than he was that the Federal courts should be given jurisdiction to punish those who might be guilty of such violations.



President Taft, in his Inaugural Address of March 4, 1909, again urged that Congress should enact law which would strengthen the hands of the National Government in the matter of the protection of the treaty rights of aliens in the United States. He said: "By proper legislation we may and ought to, place in the hands of the Federal executive the means of enforcing the treaty rights of such aliens in the courts of the United States. It puts our Government in a pusillanimous position to make definite engagements to protect aliens and then to excuse the failure to perform those engagements by an explanation that the duty to keep them is in States or cities, not within our control. . . . We cannot permit the possible failure of justice, due to local prejudice in any State or municipal government, to expose us to the risk of a war which might be avoided if Federal jurisdiction was asserted by suitable legislation by Congress and carried out by proper proceedings instituted by the executive in the courts of the National Government."

However, the exhortations of Presidents Roosevelt and Taft were no more successful in securing congressional action than had been those of Presidents Harrison and McKinley. The fact is that, viewed as a practical proposition, there are objections to the proposed legislation,—objections which were pointed out in a report made by a Committee to the American Bar Association at its annual meeting in 1892.<sup>33</sup> It is also to be observed that there is, in each case of complaint the question, which is often a serious one, whether, in fact, a treaty right of the alien has been violated.

The Committee of the American Bar Association reported that, in its opinion, the proposed legislation would be both inexpedient and unconstitutional, and, furthermore, that, in the instances of unpunished mob violence which had given rise to the demand for Federal legislation, no treaty rights of the aliens concerned had been violated. It will not be feasible to state the various grounds of inexpediency upon which the committee opposed the proposed legislation, but it will be pertinent, in the present treatise, to state the committee's argument as to the absence of treaty rights in the premises and as to the constitutionality of the proposed legislation.<sup>34</sup>

The Committee said: "The argument by which the demand for the proposed legislation is urged is that Congress has the power to confer upon the Federal courts jurisdiction to enforce rights accruing under trea-

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<sup>33</sup> In 1891 the Committee of the Association on International Law had been directed to report at the next annual meeting "Whether any legislation by Congress is desirable and practicable to give to the courts of the United States jurisdiction over criminal prosecutions for acts of violence to the persons or property of aliens, committed by citizens of the United States."

<sup>34</sup> The various grounds of inexpediency advanced by the committee are examined and criticized by Mr. Taft in his volume *The United States and Peace* (1914), Chapter II.



ties upon the same principle that such jurisdiction may be conferred to enforce or conserve any right arising under the Constitution and laws of the United States. It is then assumed that the aliens, under such a clause as is above quoted,<sup>35</sup> possesses a treaty right to have punishment meted out to a criminal who has committed a crime affecting his person or property, therefore Congress has power to secure this right and should do so by vesting in the Federal courts jurisdiction of such offenses. The basis of the argument in favor of this change in the law, is that the Federal Government has no control whatever of prosecutions in the State courts, nor can it set in motion machinery by which alone such criminal may be brought to justice."

"It may not be amiss" the report continued, "to observe that under our system of law the punishment of the criminal has come to be treated not as a satisfaction to the injured, but as an institution for the protection of society by the prevention of like crimes by others. It is the violation of the peace and dignity of the State which is to be atoned for, not the vengeance of the injured parties to be appeased. The latter was the idea underlying the primitive customs and laws of barbarism, the former that which came with the dawn and has expanded under the noonday sun of civilization. Hence it is doubtful whether there exists any right to have an assailant punished for the benefit of the injured party, whether citizen or alien; certainly there is no such treaty right. . . . The claim that any person possesses a right as an individual to have a criminal punished is, therefore, one false premise upon which the argument is based, but if the view just stated be not accepted there is still another false assumption in the statement that such right, if there be any, is secured to aliens by treaty. There is no treaty provision under which an alien can have any other or larger rights than the citizen. What the treaty secures to him is in effect the equal protection of the laws, in all respects, as it is secured to natives. In other words, with relation to injuries, the treaty right simply excludes any detriment to the alien not permissible under our laws as against the citizen. By no construction can it be held to secure to the alien larger or other rights than those of the citizen. . . . A treaty is not unilateral. The citizens of the United States have rights under this particular treaty as well as the subjects of the Italian king, and may it not fairly be said that while it is the treaty right of the Italian subject to have the same protection of the law that is accorded to the American citizen, it is equally a treaty right of our citizens that the alien shall not

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<sup>35</sup> The clause quoted is that from a treaty between the United States and Italy providing that—"The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives."

be preferred to them and be accorded rights which the citizen does not possess and which have not been secured by the treaty.

"The truth is that much has been said, in the pending discussion, about treaty rights which is misleading. It seems to be assumed throughout that the provisions of treaties for reciprocal protection to persons and property create some new rights in addition to those already possessed by foreigners residing in the United States. This might be true in countries not governed by the common law, but there is little doubt that in Great Britain and the United States every foreigner is entitled, without any treaty, to the same measure of personal liberty, personal security and protection to property as governments of those countries secure to their own subjects and citizens. . . . Every provision of a treaty made in accordance with the Federal Constitution is binding alike upon the Federal and State courts, and, so far as the State legislatures are concerned, aliens are protected against any unfavorable discrimination by the Fourteenth Amendment to the Constitution of the United States. Indeed, the advocates of this legislation themselves concede that the State legislatures are to be trusted, since in the only scheme proposed, and probably the only practicable one, the criminal law of the States is adopted as a whole. What reason is there, then, to distrust the courts and juries of the States, or why should they be considered less reliable than the Federal courts and juries?

"It is urged that foreigners are here under the protection of the United States and that the Supreme Court has decided that anybody so situated has a right to look to the laws of the United States for protection. Here again the basis of the argument is false. The foreigner is here under the same protection precisely as the citizen, and that is, under the Constitution, to be found only in the police power of the States.<sup>36</sup> . . . There

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<sup>36</sup> In support of the contention that there had been no violation of treaty rights in the matter of the failure to secure punishment of the persons guilty of lynching the Italians in Louisiana, Secretary of State Blaine wrote (*U. S. Foreign Relations*, 1891, p. 685):

"The United States did not by the treaty with Italy become the insurer of the lives or property of the Italian subjects resident within our territory. No government is able, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence prompted by individual malice or by sudden popular tumult. The foreign resident must be content in such cases to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the Courts are equally open to him for the redress of his injuries. The treaty in the first, second, third, and notably, in the twenty-third articles, clearly limits the rights guaranteed to the citizens of contracting powers in the territory of each, to equal treatment and to free access to the courts of justice. Foreign residents are not made a favored class. It is not believed that Italy would desire a more stringent construction of her duty under the treaty. Where the injury inflicted upon a foreign resident is not the act of the government or of its officers, but of an individual or of a mob, it is believed that no claim for indemnity can be justly made unless it shall be made to appear that public authorities charged

remains the most serious question of all—is it constitutional? . . .

“Nothing is better settled as a matter of law than that the police power is reserved to the States and that the jurisdiction of the Federal courts, both active and dormant, over crimes committed within the borders of a State is confined to cases in which such jurisdiction is essential to the conservation of the powers confided to the Federal government. The treaty-making power was a great concession. It gives to the Executive branch of the government (for the Senate in that matter acts as a part of the Executive power) the authority to enter into a treaty which shall have the force of law. But such treaties only are a part of ‘the supreme law of the land’ as are made under ‘the authority of the United States.’ . . . If, therefore, a treaty be executed in due form but its enforcement requires a violation of the Constitution as expounded by the Supreme Court, the keynote of which is our dual system of government, can it be doubted that such a treaty, to that extent, would be declared null and void? Applying this principle, if, as the advocates of this legislation claim the treaty provisions under consideration require us to interfere with the exercise of the police power by the States, then the treaty *pro tanto*, must fail. . . . In conclusion, the argument for this radical change must finally rest upon the theory that the State courts cannot be trusted and that in some mysterious way the government can influence prosecutions in Federal courts and not in State courts. It has been shown that in this country the Executive can do nothing but await the orderly process of the judicial tribunals of whatever jurisdiction. The grand juries and trial juries in both courts are made up of the same material and would be alike affected by any popular feeling respecting such outbreaks as that which has suggested this agitation.”

After some debate action upon the report of the Committee was postponed until the next year. At the next meeting of the Association the committee again reported adversely to the proposed legislation. The draft of a bill drawn by Judge Simeon E. Baldwin, as a substitute to that

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with the peace of the community have connived at the unlawful act, or, having timely notice of the threatened danger, have been guilty of such gross negligence in taking the necessary protection as to amount to connivance.

“If, therefore, it should appear that among those killed by the mob at New Orleans there were some Italian subjects who were resident or domiciled in that city, agreeably to our treaty with Italy and not in violation of our immigration laws, and who were abiding in the peace of the United States and obeying the laws thereof and of the State of Louisiana, and that the public officers charged with the duty of protecting life and property in that city connived at the work of the mob, or upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace and afterwards to bring the guilty to trial, the president would, under such circumstances, feel that a case was established that should be submitted to the consideration of Congress with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence.”

which had been introduced in the Senate, was argued at length for several days, but in conclusion the Bar Association refused to make any recommendation on the subject to Congress, and discharged its committee from further consideration of the subject.<sup>37</sup>

That Congress has the constitutional right to provide for the protection of the rights of aliens in the United States secured to them by treaties, or to provide, through the Federal courts, for the punishment of persons violating such treaty rights, there would seem to be no question.<sup>38</sup> It remains, however, in each case, for the courts to determine whether the treaties adduced in support of them do create such rights; and, if they are construed to do so, whether the treaties are constitutional. This matter of the constitutional extent of the Treaty-Making Power of the United States is treated in a later chapter. Whether, apart from specific treaty rights, the United States has the constitutional power to legislate as deduced from responsibilities resting upon it by reason of general principles of international law and practice is another question.

A decision of the Supreme Court that would seem to sanction such legislation is that of *United States v. Arjona*.<sup>39</sup> *Arjona*, the defendant, was

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<sup>37</sup> The draft of the bill prepared by Judge Baldwin read as follows:

"Section 1. If any act of violence shall be committed within any State or Territory of the United States against the person or property of any citizen or subject of a foreign government, between which and the United States there exists a treaty at the time, and such act is one which would constitute a crime or misdemeanor at common law, but is not an offense prohibited, or the punishment whereof is otherwise specially provided for by any statute of the United States; and if the party committing said act is not arrested and held for trial within six months after its commission, under the laws of such State or Territory; then, should the minister or other accredited diplomatic representative of such foreign government complain to the Secretary of State of the United States, that said act, or the omission to hold for trial the party committing the same, was an infraction of such treaty, the president of the United States, may, if he be of opinion that there are grounds for such complaint, direct criminal proceedings to be instituted against such party, in the proper Courts of the United States, holden within said State or Territory.

"Section 2. In any proceeding so instituted by direction of the President, the act committed by the party accused shall subject him to the same punishment as that prescribed by the laws, in force at the time of the commission of such act, of such State or Territory, for such acts; and if said laws prescribe no punishment therefor, then said act shall be punishable in said proceeding as at common law; and no subsequent repeal of any such State or Territorial law shall affect any prosecution for such offense in any Court of the United States.

"Section 3. The institution of such proceedings in a proper Court of the United States shall operate as a bar to any future proceedings of a criminal nature against the defendant therein in any State or Territorial Court."

<sup>38</sup> See, for a discussion of this, *post*, Chapter XXXV, entitled "Congressional Legislation for the Enforcement of Treaties." See especially, however, the case of *Baldwin v. Franks* (120 U. S. 678).

<sup>39</sup> 120 U. S. 479.

indicted under an act of Congress of 1884 providing for the punishment of persons counterfeiting the securities of foreign governments. Upon the constitutionality of this act being questioned upon the ground that, though the United States had the implied right to declare criminal the counterfeiting of its own bonds and notes, it had not the power thus to protect those of the other powers, the Supreme Court, in its opinion, said "The National Government is . . . made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized to 'define and punish . . . offenses against the law of nations.' . . . Consequently a law which is necessary and proper to afford this protection is one that Congress may enact because it is one needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation and which the law of nations has imposed upon them as part of their international obligations. This, however, does not prevent a State from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a State, as well as that of the United States." <sup>40</sup>

#### § 189. Japanese Aliens in the United States.

Various constitutional questions which have arisen with reference to the rights of Japanese aliens in the United States will be described in Section 325 dealing with the Treaty-Making Power of the United States.

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<sup>40</sup> Cf. on this whole subject the essay by J. I. Chamberlain, *The Position of the Federal Government of the United States in Regard to Crimes Committed against the Subjects of a Foreign Nation Within the States*. Also Reports of American Bar Association for 1891, 1892, 1893; Congressional Record, 52nd Congress, 1st Session, 1892; Annual Message of President, December, 1901, and Proceedings of the American Society of International Law, 1908.

## CHAPTER XVIII

### AMERICAN CITIZENSHIP

#### § 190. Citizenship Defined.

From the consideration of the status of aliens, we turn to an examination of the status of citizens or subjects.

The citizen or subject body of a State, regarded from the point of view of other States, that is, from the point of view of International Law, constitutes one homogeneous body, all the members of which have the same status, the same rights and duties. Considered, however, from the point of view of the constitutional or municipal law of the State in question, they may be grouped into distinct classes, with differing public and private rights. Thus it is that in the constitutional jurisprudence of the United States we have at present not only a distinction between Federal and State citizenship, but, within the class of Federal citizens, as including all those persons subject to the full sovereignty of the United States, a distinction between those who are "citizens of the United States" according to the meaning of that phrase as used in the Constitution of the United States, and those who, though subjects of the United States, are not citizens within this narrower constitutional sense.

In *Minor v. Happersett*,<sup>1</sup> decided in 1875, the definition of citizenship, its essential character, and the privileges necessarily attaching to its possession, were examined in passing upon the claim made that a woman, as a citizen of the United States, might not, simply because of her sex, be denied by a State the right of suffrage. In denying this claim, Chief Justice Waite, who rendered the unanimous opinion of the court, declared: "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly

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<sup>1</sup> 21 Wall. 162.

employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterward adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation and nothing more."<sup>2</sup>

### § 191. State and Federal Citizenship Distinguished.

As adopted, the Federal Constitution contained no definition of citizenship. Impliedly, however, it recognized a State citizenship in that clause which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It would also seem to have recognized a Federal citizenship in the clauses providing that the President shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution;" that Senators and Representatives shall have been nine and seven years respectively citizens "of the United States;" and that Congress shall have the power to pass laws regulating the naturalization of aliens.

There has never been any question as to the existence under the Constitution of a distinction between State and Federal citizenship.<sup>3</sup> The only dispute has been as to the relation of the two.

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<sup>2</sup> See, holding that the elective franchise is not a necessary incident of citizenship: 1. As to negroes—*Smith v. Moody*, 1866 (26 Ind. 299); *United States v. Crosby*, 1871 (1 Hughes, 448); *Anthony v. Holderman*, 1871 (7 Kans. 50); *Van Valkenburg v. Brown*, 1872 (43 Cal. 42); *United States v. St. Petersburg* (3 Hughes, 493); *United States v. Reese*, 1875 (92 U. S. 214); and see *Opinions of Justices*, 1857 (4 Me. 507). 2. As to women—*Spencer v. Board*, 1873 (8 D. C. 169); *United States v. Anthony*, 1873 (11 Blatchf. 200); *Minor v. Happersett*, 1874 (21 Wall. 162); *Dorsey v. Brigham* (177 Ill. 250); *Gougar v. Timberlake*, 1896 (148 Ind. 38); and see also *People v. Oldtown*, 1878 (88 Ill. 202); also *Ware v. Wisner*, 1883 (50 Fed. 310) holding that women are citizens. 3. As to minors—*Lyons v. Cunningham*, 1884 (66 Cal. 42); and see *People v. Oldtown*, *supra*. 4. As to Indians, holding that though they may have voted, this did not make them citizens—*Laurent v. State*, 1863 (1 Kans. 313). 5. As to aliens—*Spragins v. Houghton*, 1840 (2 Scam. [3 Ill.] 377); *In re Wehlitz*, 1863 (16 Wis. 443); *United States v. Hirschfeld*, 1876 (13 Blatchf. 330); *Lanz v. Randall*, 1876 (4 Dill. 425); *City of Minneapolis v. Reum*, 1893 (56 Fed. 576). An averment in pleading that one was "a citizen and resident" was held not equivalent to a specific charge that he was an "elector"—*Blanck v. Pausch*, 1885 (113 Ill. 60). That the elective franchise is not a right of citizenship is shown also by the fact that the courts have repeatedly sustained legislation which provides for a certain prior residence before voting in the county, town, and precinct. See *Anthony v. Holderman*, 1871 (7 Kans. 50). And for the imposition of other requirements for voting see *Anderson v. Baker*, 1865 (23 Md. 531); *People v. De La Guerra*, 1870 (40 Cal. 311).

This note is taken from the *Report on Citizenship*, 1906. H. R. Doc. No. 326, 59th Cong., 2d Session, p. 46.

<sup>3</sup> See, for instance, the early case of *Talbot v. Janson* (3 Dall. 133), decided in 1795, in which the renunciation of State citizenship, for which provision was made by the

Prior to the argument of the Dred Scott case there was surprisingly little discussion of this point. The opinion generally held seems, however, to have been that every citizen of a State was a citizen of the United States. This was the view declared by Rawle in his work on the Constitution and by Story in his *Commentaries*. Story says: "Every citizen of a State is *ipso facto* a citizen of the United States."<sup>4</sup> But it would appear that Story did not hold that the Federal citizen body is made up exclusively of State citizens, for in the next section he adds: "And a person who is a naturalized citizen of the United States, by a like residence in any State of the Union becomes *ipso facto* a citizen of that State. So a citizen of a territory of the Union by a like residence acquires the character of the State where he resides." In support of this last statement, Story refers to the case of *Gassies v. Ballou*.<sup>5</sup> In that case, decided in 1832, it was held that the allegation that the defendant had been naturalized as an American citizen and was residing in Louisiana was equivalent to an averment that he was a citizen of that State. "A citizen of the United States," Marshall declared without argument, "residing in any State of the Union, is a citizen of that State." This language intimated that Federal citizenship was fundamental, but the point was not reasoned out and did not voice the general opinion.

From the foregoing it appears that it was held that there was a reciprocal relationship between Federal and State citizenship. By residence in a State a Federal citizen became *ipso facto* a citizen of that State; and a State citizen was *ipso facto* a Federal citizen. This doctrine did not, it is evident, decide the question as to which of the two citizenships was the more fundamental. Calhoun and others of his school have, by some writers, been credited with the doctrine that there was no Federal citizenship apart from the State citizenship—that one could become a Federal citizen only by first becoming a citizen of one of the States.<sup>6</sup> Calhoun did not, however, take exactly this position. In a speech delivered in the United States Senate in 1833 upon the then pending Force Bill, he declared: "If by a citizen of the United States he [Senator Clayton] means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of the population. . . . Every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of cit-

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State Constitution, was held not to operate as a renunciation of allegiance to the United States. Of course, State citizenship may be lost by residence outside of the State without National citizenship being affected. (*Prentiss v. Brennan* [2 Blatchf. 162].)

<sup>4</sup> Section 1687.

<sup>5</sup> 6 Pet. 761.

<sup>6</sup> For example, see Brannon, *The Fourteenth Amendment*, p. 17.



izens in the several States; and it is in this and no other sense that we are citizens of the United States." In other words, that there was no citizenship apart from or independent of local citizenship whether of a State or a Territory or the District of Columbia.

From this it will be seen, however, that Calhoun recognized not only a State citizenship but a Territorial citizenship, which latter, of course, could be derived only from a Federal source. What he and others of the States' Rights school held was that as between State citizenship and Federal citizenship, the former was the more fundamental; that, in other words, the latter, except as to citizens in the Territories, was derived from the former. The fact of the Federal control of naturalization Calhoun explained by alleging that that power was one which enabled Congress simply to remove the disabilities of foreign birth, the several States being left free to decide whether or not, when such disabilities had been removed from aliens resident within their borders, they should be accepted by them as citizens.

#### § 192. The Dred Scott Case.

The whole question of the relation between State and Federal citizenship came up for discussion and decision in the Dred Scott case<sup>7</sup> decided in 1857. Two of the questions involved in this case were: Whether a State might make a negro one of its citizens; and, if so, whether such a one thereby necessarily became a citizen of the United States and as such entitled to the special privileges and immunities created by the Constitution, among which privileges was the right to bring a suit in a Federal court under that clause of the Constitution which gives to the Federal judiciary the power to hear and determine suits between "citizens of different States."

The plaintiff in this case was a negro of African descent, whose ancestors were of pure African blood, and who had been brought into this country and sold as slaves. The plea in abatement set up that, whether free or not, and whether by the laws of Missouri a citizen of that State or not, Scott was not, and could not by the action of a State be made a "citizen" in the strict sense of that word as used in Article III of the Constitution. In sustaining this plea, Chief Justice Taney in his opinion said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. . . . In discussing this question, we must not confound

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<sup>7</sup> Scott v. Sandford (19 How. 393).

the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character."

There was no dissent on the part of any of the Justices of the Supreme Court from the doctrine declared by Taney that it did not lie within the power of the individual States to create Federal citizens by admitting whomsoever they should see fit to their own citizenship. Justice Catron, however, argued that, under the pleadings, the plea in abatement, and, therefore, the question of citizenship, was not properly before the Supreme Court, and Justices McLean and Curtis in the particular case at bar argued that Scott by fact of birth within the United States was a citizen of the United States, and, by domicile, was a citizen of the State of Missouri. In his dissenting opinion, Justice McLean argued that under the demurrer which was filed to the plea in abatement, Scott was to be considered a free man, and that, as such, whether or not he was of negro descent and had been a slave, he was a citizen of the United States and of the State in which he was domiciled. "Being born under our Constitution and laws," he said, "no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term 'citi-

zen' is a 'freeman.' Being a freeman, and having a domicile in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him."

Justice Curtis in his dissenting opinion, after declaring the principle that the Constitution must have recognized as citizens of the United States all those who were recognized by the States as citizens at the time the Constitution was adopted, took issue with Chief Justice Taney as to the statement that in 1789 free negroes were nowhere in America recognized as citizens. At that time, he alleged, not only were all free native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, including those descended from African slaves, citizens of those States, but that free negroes, where they had the necessary qualifications, possessed the franchise of electors on equal terms with other citizens. Hence, he declared, when the Constitution was adopted these became citizens of the United States, and of course remained citizens of the States in which they were domiciled. "I can find nothing in the Constitution," he said, "which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States."<sup>8</sup>

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<sup>8</sup> In an able article, entitled "Emancipation and Citizenship" in the *Yale Law Journal*, XV, 263 (April, 1906), Mr. Gordon E. Sherman shows conclusively the fact that during the period from 1775 to 1789 free negroes were very generally held to be citizens of the colonies or States in which they lived, but that there soon began in some commonwealths a desire to banish the freedmen from their borders, to prohibit their entrance from other States, and to deny the privileges and status of citizenship to such as remained within their several jurisdictions. The historical data cited by this article has very generally been held fully to demonstrate the incorrectness of Taney's assertion that, at the time the Constitution was adopted, the free negro was nowhere regarded as a citizen or as qualified for citizenship. Furthermore, there had been, prior to the Dred Scott case, several decisions of State courts in which free negroes had been held to be citizens. Thus, for example, in *State v. Manuel* (3 Dev. & Bat. 20), decided in 1835, the court said: "According to the laws of this State all human beings within it who are not slaves fall within one or two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity—or disqualification of color—was removed they became persons, and were then either British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution no other change took place in the law of North Carolina than was consequent upon the transition from

It will be noticed that Curtis, in his opinion, makes Federal citizenship dependent on State citizenship—that everyone who is by the Constitution or laws of a State a citizen thereof, is *ipso facto*, a Federal citizen, and that, indeed, the General Government is without the power to deny its citizenship to those thus created State citizens by State law. This he states still more explicitly a little later on. The only power granted to Congress

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a colony dependent on an European king to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here became freemen; and, therefore, if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State. A few only of the principal objections which have been urged against this view of what we considered the legal doctrine will be noticed. It has been said that by the Constitution of the United States the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State; the former belongs to the Government of the United States. It would be a dangerous mistake to confound them."

The court then went on to show that the State Constitution gave the franchise to every adult, without regard to color, who had paid a public tax. For cases holding that the free negro was not a citizen, see *Amy v. Smith* (1 Litt. [Ky.] 326), decided in 1822; *Crandall v. State* (10 Conn. 339), decided in 1834; *State v. Claiborne* (1 Meigs [Tenn.] 331), decided in 1838; *Pendleton v. State* (6 Ark. 509), decided in 1846; *Cooper v. Mayor* (4 Ga. 68), decided in 1848. In the first of these cases the court said: "Prior to the adoption of the Federal Constitution the States had a right of making citizens of any persons they pleased, but as the Constitution does not authorize any but white persons to become citizens of the United States it furnishes a presumption that none others were citizens at the time of its adoption."

In *Pendleton v. State*, the judge declared: "If citizens in a full and constitutional sense, why were they not permitted to participate in its formation? They certainly were not. The Constitution was the work of the white race; the Government, for which it provides, and of which it is the fundamental law, is in their hands and under their control; and it could not have been intended to place a different race of people in all things upon terms of equality with themselves. Indeed, if such had been the desire, its utter impracticability is too evident to admit of doubt. The two races, differing as they do in complexion, habits, conformation, and intellectual endowments, could not, nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human agency must change the decree. Those who framed the Constitution were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause to which we have referred."

In a number of cases the courts held a middle position according to which free negroes were described as citizens of an order lower than that of whites. For these, and other references, see Report on Citizenship of the United States (1906), H. R. Doc. No. 326, 59th Congress, 2nd Session, pp. 63-66.

It may be pointed out that the simple fact that certain States had given the vote to negroes would not prove that they recognized them as citizens for, as will later appear, the States of the Union have in a number of instances extended their right of suffrage to resident aliens.

with reference to the subject, he says, is that of naturalization, and this extends only to the removal of the disabilities of foreign birth. These disabilities removed, it is left, he declares, with the States individually to determine whether or not the persons thus relieved of such disabilities, are to be admitted to State citizenship and thereby to Federal citizenship. Even as to native-born free white persons it is left to the States to determine whether or not they shall be recognized as citizens. In his opinion, Curtis said: "Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered, that though the Constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were then citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people of the National Government. Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First, the powers to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. Second: Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. Third: What native-born persons should be citizens of the United States. The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped."

Referring to that clause of the Constitution which provides that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," Justice Curtis said: "Nowhere else in the Constitution is there anything concerning a general citizenship; but here privileges and immunities to be enjoyed throughout the United States, under and by force of the National compact, are granted and secured. In selecting those who are to enjoy these National rights of citizenship—how are they described? As citizens of each State. It is to them these National rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guaranteed by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the

action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. . . . Laying aside, then, the case of aliens, concerning which the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth, that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were 'the people of the United States,' for whom and whose posterity the government was declared in the preamble of the Constitution to be made; that each of them was 'a citizen of the United States at the time of the adoption of the Constitution,' within the meaning of those words in that instrument; that by them the government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them—the necessary conclusion is, that those persons born within the several States, who by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States. . . . It has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens. The answer is obvious. The Constitution has left to the States the determination what persons born within their respective limits, shall acquire by birth citizenship of the United States, and it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress."<sup>9</sup>

In effect, the Dred Scott decision held that native-born negroes, whether free or slave, living in the United States, though subjects of the United States, that is, owing allegiance to the United States, were not, and could

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<sup>9</sup> At the first hearing of this case before the Supreme Court, four justices, McLean, Catron, Grier, and Campbell, held that the plea in abatement, setting up the question of citizenship, was not properly before the court because the defendant had submitted and pled over to the merits. Justice Nelson was in doubt as to this. Upon the second hearing, Nelson agreed with these four, and, consequently, no one of the five—a majority of the court—discussed the question in the opinions which they individually rendered. Justices Wayne and Daniel agreed with Taney and Curtis that the plea was properly before the court.

not either by State or Federal action, be made "citizens" of the United States within the meaning of the term as used in the Constitution.

§ 193. The Fourteenth Amendment.

In 1868 was adopted the Fourteenth Amendment which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The two main purposes of this declaration undoubtedly were: (1) The assertion that National citizenship is primary and paramount to State citizenship; and (2) the granting of both National and State citizenship to the negro. That National citizenship was to be paramount is shown not only in the words just quoted, but in the further provision of the amendment that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the Slaughter House cases, as is elsewhere shown,<sup>10</sup> the Supreme Court held, in effect, that this amendment did not have the effect of absorbing State citizenship and its appurtenant rights into the National citizenship, but that the two remain as distinct as before. Upon this point the court declared: "It [the clause defining citizenship] declares that persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."<sup>11</sup> The next observation is more important. . . . It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of

<sup>10</sup> *Ante*, Sec. 193.

<sup>11</sup> This interpretation of the phrase "subject to its jurisdiction" was a mere *dictum* of the court, the point not being involved in the suit at bar. Moreover it was an incorrect *dictum* so far as regards persons born within the United States of parents who are aliens. *U. S. v. Wong Kim Ark* (169 U. S. 649).

a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."

In the above it will be noticed that the court declared that an additional element is necessary to convert a Federal citizen into a State citizen. This additional element, furthermore, is one the giving or refusing of which is not within the control of the State. By the mere act of taking up residence within a State, which the State cannot prevent, a Federal citizen, *ipso facto*, becomes a citizen of the State. The State thus no longer has any power to determine who shall be or become its own citizens. The Federal Constitution fixes that once for all.

But though the States may not determine who shall constitute its citizen body, they still retain, as the decision in the Slaughter House cases went on to declare, a full authority, free from Federal supervision and control, to decide what political privileges—as, for instance, the right to vote, or to hold office—shall exist, and who shall be entitled to enjoy them. Thus, upon the one hand, Federal and State citizenship does not entitle one, of right, to the suffrage or qualify him for public office. Upon the other hand, the States may grant, and in a number of cases have granted, these privileges to aliens who, though not naturalized, have declared their intention, according to the requirements of the national law regulating naturalization, of becoming United States citizens.

Since the adoption of the Fourteenth Amendment there has been no question but that all persons, including negroes, born or naturalized in the United States become by mere residence in a State citizens of the State. Furthermore, there is, and has been, no question but that, as Taney says in his opinion in the Dred Scott case, a State cannot, by granting its citizenship to an alien, create such a one a Federal citizen or endow him with any of the privilege appertaining to that status, for the right of naturalization is, as we shall see, exclusively vested in the Federal Government.

But though it has never been authoritatively so decided by the Supreme Court of the United States, it would seem that while a State cannot prevent a Federal citizen from becoming one of its own citizens, it may grant its own citizenship to one not a Federal citizen, and even to one, as for instance an Asiatic, who, according to existing Federal law, cannot become a Federal citizen. This position was taken by the State court of Wisconsin in *Re Wehlitz*.<sup>12</sup>

In a line of decisions it has been held that a person may by residence abroad lose his State citizenship within the meaning of the constitutional provision which opens the Federal courts to suits between citizens of different States, without losing his Federal citizenship.<sup>13</sup>

<sup>12</sup> 16 Wis. 443. See also Desbois' case (2 Martin, 185). *Contra*, *Lanz v. Randall* (4 Dill. 428).

<sup>13</sup> *Prentiss v. Brennan* (2 Blatchf. 162); *Picquet v. Swan* (5 Mason, 35).



Whether or not a State may make an alien one of its own citizens, it can, without making him such, endow him with all the privileges of its citizenship, and even give him the franchise. It may be added, also, that, in a number of States, the alien who has made this declaration is given certain privileges which are denied to other aliens; for example, to hold real estate, and to be employed on public works. By Federal law, also, he may preempt and acquire public lands:<sup>14</sup> and, if he dies before becoming actually naturalized, his inchoate right to citizenship descends to his widow and children who may be naturalized without themselves making the declaration.<sup>15</sup> He is, on the other hand, liable to certain obligations not required of other aliens; for example, the performance of military service.<sup>16</sup> It may be observed that if it be granted that a State has the right to naturalize an alien as its own citizen, it would seem that such a one, though not a citizen of the United States, would have the rights conferred by the comity clause, and, possibly, by Section 2, of Article III of the Constitution. The question as to how State citizenship is determined is considered in Chapter XVIII in connection with the discussion of "diversity of citizenship" as giving jurisdiction to the Federal courts.

#### § 194. District of Columbia and Territories.

Inhabitants of the District of Columbia and of a Territory are not citizens of a State within the meaning of the Constitution. They are, however, of course, citizens of the United States.<sup>17</sup>

#### § 195. *Boyd v. Nebraska* Criticized.

In *Boyd v. Nebraska*,<sup>18</sup> decided in 1892, the Supreme Court took the extreme view, that, in the case of a State law or Constitution which demanded as one of the qualifications for office, that the incumbent should have been for two years next preceding his election a citizen of the United States, it did not lie with the tribunals of that State finally to determine in any given case when such citizenship existed; and, in the case at bar, which was a proceeding in quo warranto, the Federal court declared entitled to the office of governor of the State one whom the court of that State had declared ineligible because, as it held, he was not a citizen of the United States. In other words, the Federal Supreme Court substituted its judgment for that of the State's supreme tribunal as to the existence of a quali-

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<sup>14</sup> Rev. Stats., Secs. 2259, 2289.

<sup>15</sup> Rev. Stat., Sec. 2168; and act of June 29, 1906. *Cf.* *Boyd v. Nebraska* (143 U. S. 135).

<sup>16</sup> Act March 3, 1863.

<sup>17</sup> *Hepburn v. Ellzey* (2 Cr. 445); *Reilly v. Lamar* (2 Cr. 344); *Barney v. Baltimore City* (6 Wall. 280); *New Orleans v. Winter* (1 Wh. 91); *American Insurance Co. v. Canter* (1 Pet. 511).

<sup>18</sup> 143 U. S. 135.

fication for a State office prescribed by the Constitution of that State. In so doing, to the author's mind, the court exceeded its proper powers. Had there been involved the exercise of a right, or the recognition of a privilege or immunity attached by the Federal Constitution or laws to Federal citizenship, there can be no question but that the State tribunals should not have been given final authority to determine as to the existence of this Federal citizenship, any more than they are permitted in the case of a State law alleged to impair the obligation of a contract to determine whether a contract exists to be impaired, or, if it exists, whether it has in fact been impaired. But in *Boyd v. Nebraska* the real question was as to the existence of a qualification for a State office—the qualifications for which, it was undisputed, the State might determine as it should see fit. The reasoning of Justice Field in his dissenting opinion upon this point seems incontrovertible.<sup>19</sup>

#### § 196. *Wong Kim Ark Case.*

In the case of *United States v. Wong Kim Ark*,<sup>20</sup> decided in 1898, the Supreme Court was called upon to determine whether, under the terms of the Fourteenth Amendment, persons born in the United States of alien parents, are citizens of the United States. In this case the question was as to the citizenship of a child of Chinese parents who not only were not citizens of the United States, but could not, under the existing laws, become such by naturalization. In sustaining Ark's citizenship the court held that the clause of the Amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," is but declaratory of the common-law principle unreservedly accepted in England since Calvin's case (the case of *Postnati*, decided in 1608) and in the United States since the Declaration of Independence, that all persons, irrespective of the nationality of their parents born within the territorial limits of a State, are *ipso facto*, citizens of that State. The court admitted that the principle of the Roman law according to which the citizenship of the child follows that of the parent, irrespective of the place of birth, had been accepted by certain of the European nations, but denied that this principle had become a true and universal rule of international law, or, if it had, that it had thereby superseded the rule of the common law.<sup>21</sup>

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<sup>19</sup> See *ante*, Sec. 196.

<sup>20</sup> 169 U. S. 649.

<sup>21</sup> The court said: "At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia.

The opinion declared: "The first section of the Fourteenth Amendment of the Constitution begins with the words, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' As appears upon the face of the Amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption.<sup>22</sup> It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford*, 1857,<sup>23</sup> and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.<sup>24</sup> But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in the Slaughter House cases above cited."

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Cookburn, *Nationality*, 14-21. There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion. Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship. Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. . . . So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective), conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country which have gone the farthest toward holding such statutes to be declaratory of the common law, have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent, *Com.* 39, 50, 53, 258, note; *Lynch v. Clarke* (1 Sandf. Ch. 583, 649); *Ludlam v. Ludlam* (26 N. Y. 356)."

<sup>22</sup> For comments on the "history of the times," and the debates in Congress as showing the intended meaning of the citizenship clause of the Amendment, see pages 697-699 of the opinion in the *Wong Kim Ark* case. See also Van Dyne, *Citizenship of the United States*, Chapter I.

<sup>23</sup> 19 How. 393.

<sup>24</sup> Citing *The Slaughter House cases* (16 Wall. 36); *Strauder v. West Virginia* (100 U. S. 303); *Ex parte Virginia* (100 U. S. 339); *Neal v. Delaware* (103 U. S. 370); *Elk v. Wilkins* (112 U. S. 94).

Regarding the phrase of the Fourteenth Amendment "subject to the jurisdiction thereof," the court said: "The real object of the Fourteenth Amendment 'of the Constitution in qualifying the words, 'all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in peculiar relation to the National Government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country." <sup>25</sup>

"The power of naturalization, vested in Congress by the Constitution," the opinion continued, "is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances which a native might sue.' <sup>26</sup> Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori*, no act or omission of Congress, as to the providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterward, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the

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<sup>25</sup> Citing *Calvin's Case* (7 Coke, 118b); *Cockburn, Nationality*, 7; *Dicey, Conf. Laws*, 177; *Inglis v. Sailor's Snug Harbor* (3 Pet. 99); 2 Kent, *Com.* 39.

<sup>26</sup> *Osborn v. U. S. Bank* (9 Wheat. 738).

classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment. The fact, therefore, that acts of Congress or treaties have permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'"

The acceptance of the foregoing doctrine, it was held, does not prevent the United States from providing that children born abroad of American citizens shall be considered citizens of the United States.<sup>27</sup>

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<sup>27</sup> Chief Justice Fuller rendered in the Wong Kim Ark case a dissenting opinion concurred in by Justice Harlan. These justices took the position that nationality was essentially a political idea and as such the constitutional provisions regarding it were to be interpreted in the light of international rather than English municipal provisions. "Obviously," they said, "where the Constitution deals with common-law rights and uses common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does, international relations, and political as distinguished from civil status, international principles must be considered, and unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction."

This affirmative acceptance of the English common law upon this subject, these justices were unable to find. Upon the contrary, they found in the executive practice and various legislative acts of the United States Government rejection of important parts of the English doctrine of citizenship. Thus, for example, since the Declaration of Independence, this country had consistently rejected what, until 1870, was the doctrine of inalienable allegiance; that is, the doctrine denying the general right of expatriation. Furthermore, it was asserted by these dissenting justices that the act of Congress providing that children born abroad of American parents are American citizens, was an evidence that the common-law doctrine of *jus soli*, as distinguished from the civil rule of *jus sanguinis*, was not accepted as the general principle governing natural citizenship. After a review of the treaties of the United States with China, and various acts of Congress and decisions of the courts with reference thereto, Chief Justice Fuller concluded: "Did the Fourteenth Amendment impose the original English common-law rule on this country? Did the Amendment operate to abridge the treaty-making power, or the power to establish a uniform rule of naturalization? I insist that it cannot be maintained that this government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein. A treaty couched in those precise terms would not be incompatible with the Fourteenth Amendment, unless it be held that that Amendment has abridged the treaty-making power. Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the Amendment has abridged the power of naturalization. This cannot apply to our colored fellow citizens, who never were aliens—were never beyond the jurisdiction of the United States. 'Born

### § 197. Deprivation of Citizenship.

Congress has provided that in certain cases, as, for example, desertion from the military or naval forces of the United States or avoiding draft into such services, citizens of the United States shall be deemed to have forfeited their rights of citizenship. It would appear that this forfeiture of the "rights of citizenship" is not equivalent to the forfeiture of citizenship itself, for, though the rights are lost, the obligations are not destroyed.

Congress has furthermore provided that American citizenship may be lost by an American woman marrying a foreigner,<sup>28</sup> and also that, in certain cases naturalized citizens may be presumed to have abandoned their American citizenship, as, for example, by returning to their native countries and residing there for certain periods of time.

In *Mackenzie v. Hare*,<sup>29</sup> the question was raised as to the constitutionality of the annulment of American citizenship under the provision of the act of March 2, 1907,<sup>30</sup> that any American woman who marries a foreigner

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in the United States, and subject to the jurisdiction thereof,' and 'naturalized in the United States, and subject to the jurisdiction thereof,' mean born or naturalized under such circumstances as to be completely subject to that jurisdiction, that is, as completely as citizens of the United States, who are of course not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our government, if they happen to be found in the country of their parents' origin and allegiance, or any other. . . . I think that it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the Fourteenth Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise? But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton, *Conf. Laws*, § 12. . . . It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the contrary, I am of opinion that the President and the Senate by treaty, and the Congress by naturalization, have the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship by birth on children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens."

<sup>28</sup> This is not necessarily the case since the Married Woman's Naturalization Act of September 22, 1922. 42 Stat. at L. 1021.

<sup>29</sup> 239 U. S. 299.

<sup>30</sup> 34 Stat. at L. 1228.

shall take the nationality of her husband," the contention being that, under the Constitution the plaintiff's citizenship became a right or privilege which could not be taken away from her except as a punishment for crime or by her voluntary expatriation. To this the court replied: "As a Government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. . . . It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. . . . The marriage of an American woman with a foreigner . . . may involve national complications of like kind as her physical expatriation may involve. Therefore, as long as the relation lasts, it is made tantamount to expatriation. That is no arbitrary exercise of government."

It will appear from this case, that the United States has a constitutional power to deprive one of his or her American citizenship. There is, further, the *obiter* statement, that this deprivation may not be an arbitrary one. An arbitrary deprivation would probably be held to be a denial of due process of law, for, in the case, the court said: "We concur with counsel that citizenship is of tangible worth."

## CHAPTER XIX

### NATURALIZATION

#### § 198. Naturalization by Statute.

Each country determines, by its own municipal law, the persons to be admitted to its citizenship.

Since the adoption of the Constitution it has been recognized that citizenship of the United States may be obtained in two ways—by birth within the country, and by naturalization. As has been already learned, up to the time of the *Dred Scott* decision there was doubt whether birth within the United States or naturalization by the General Government was sufficient to endow one with either Federal or State citizenship. By that decision this doubt was resolved in the negative, it being held that no one by mere birth became a citizen of the United States, and that one could become a Federal citizen only by becoming first a citizen of a State, though it was also held, it will be remembered, that a State could not, by making an African negro one of its own citizens, thereby endow him with the general constitutional privileges of Federal citizenship. By the Fourteenth Amendment, however, it was declared that National citizenship is no longer dependent upon State citizenship, and that mere birth within the United States, even though of alien parents, or naturalization by Federal law, is sufficient to create National citizenship; and that residence in a State is sufficient to render such a one a citizen of that State.

We thus see that the power given to Congress by Article I, Section 8, Clause 4, of the Constitution "to establish an uniform rule of naturalization" is not to be construed, as was once alleged, as simply a power to remove the disabilities of foreign birth, leaving it to the States to determine whether or not, when such disabilities are removed, the individual shall become a citizen of the State where he resides, and thereby a citizen of the United States in the full constitutional sense of the term; but that it is a full complete power on the part of Congress to provide for the creation of Federal citizens by the naturalization of persons of foreign birth. With the exception of a few early cases <sup>1</sup> there has never been any question but that the power of naturalization, whatever its scope, is vested exclusively in Congress. The cases holding this from the time of *Chirac v. Chirac* <sup>2</sup> to *United States v. Wong Kim Ark* <sup>3</sup> are too numerous to cite.<sup>4</sup>

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<sup>1</sup> See especially *Collet v. Collet* (2 Dall. 294).

<sup>2</sup> 2 Wh. 259.

<sup>3</sup> 169 U. S. 649.

<sup>4</sup> For an excellent statement of the exclusiveness of the Federal power, see Taney's opinion in *Scott v. Sandford* (19 How. 393). In *Chirac v. Chirac*, Chief Justice Mar-



It lies within the legislative discretion of Congress to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended; but, as was said in the *Wong Kim Ark* case, not to limit the civil and political rights of naturalized citizens beyond the limits provided for in the Constitution.

Except as limited by the Constitution it is within the power of Congress to determine the civil and political rights which naturalized citizens shall enjoy, and to make these rights less than those possessed by natural-born subjects. The due process of law clause of the Fifth Amendment, however, would prevent any very great discrimination as to their civil rights, and this limitation is reinforced by the obligations of international comity. The Constitution itself provides that only a natural-born citizen shall be eligible to the Presidency,<sup>5</sup> or to the Vice-Presidency.<sup>6</sup>

#### § 199. Natural-Born Citizen Not Yet Defined.

So far as the author knows, no fully satisfactory definition of the term "natural-born citizen" has yet been given by the Supreme Court. Thus it is not certain whether a person born abroad of American citizens who have themselves resided in the United States is to be deemed a natural-born citizen or a citizen naturalized by the act of Congress which provides that such persons shall be deemed to be citizens of the United States. To the author, it would seem reasonable to hold that anyone who is able to claim United States citizenship without any prior declaration upon his part of a desire to obtain such a status should be deemed a natural-born citizen. If this doctrine should be accepted, persons born abroad of parents themselves citizens of the United States and having resided in the United States, would be not regarded as natural-born citizens, because, in fact, it is provided by act of Congress of March 2, 1807,<sup>7</sup> that such persons, in order to receive the protection of the United States, are required, upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and, moreover, are required to take the oath of allegiance to the United States upon attaining their majority. It is also to be observed that for many years there existed no statutory provision whatever for the citizenship of persons born abroad of American parents who had not become American citizens prior to the act of 1802.

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shall said: "That the power of naturalization is exclusively in Congress does not seem to be and certainly ought not to be controverted." In fact, in the earlier case of *Collet v. Collet* (2 Dall. 294), the States had been declared to have a concurrent power to naturalize. However, Marshall's dictum has not since been questioned, and has been repeatedly affirmed by the Supreme Court. See, for example, *United States v. Wong Kim Ark* (169 U. S. 649).

<sup>5</sup> Art. II, Sec. 1, Cl. 5.

<sup>6</sup> Twelfth Amendment.

<sup>7</sup> 34 Stat. at L. 1229.

In *Weedin v. Chin Baw*<sup>8</sup> it was held that a person born abroad of parents who were citizens of the United States but who had never resided in the United States, was not a citizen of the United States although his parents, subsequently to his birth, took up their residence in the United States. Whether or not a person was to be deemed to have the right to claim American citizenship, the court said, was determined at the time of birth, and this could not be subsequently changed by any acts upon his part or upon the part of his parents. This conclusion was founded upon the construction to be given to the act of Congress of 1855, in the light of the act of Congress of March 2, 1907.

**§ 200. Determination of Conditions of Naturalization a Legislative Act: the Granting of Naturalization a Judicial Act.**

The determination of the conditions under which naturalization shall be extended and the persons eligible for such naturalization is a legislative act, but the granting or withholding of naturalization is, in the United States, a judicial act.<sup>9</sup>

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<sup>8</sup> 274 U. S. 657.

<sup>9</sup> Until 1870 naturalization in England was by special act of Parliament. Naturalization papers are now granted by the Home Secretary. India and many of the other British colonies have laws of their own fixing the terms on which they will grant their own special citizenship to aliens—a citizenship which, of course, does not carry with it a general English citizenship. This practice is anomalous in that it makes the one so naturalized swear fealty to the English King and repudiate all foreign allegiance, and yet does not make him an English citizen except for the particular colony. Thus the British Naturalization Act of 1870 (Section 16) provides: "All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall, within such limits, have the authority of law." In an interesting note in the *Juridical Review* (XIV, 299) entitled "Naturalization in the Colonies," the question is raised as to the status in foreign countries of a person who has been granted all the rights of British citizenship within a particular colony, and has sworn fealty to the British King and has foresworn all other allegiance:—whether, for example, such a one while in France plotting against the English King would be guilty of treason, or what degree of British protection such a naturalized colonial would be entitled to in other than British territory. The author inclines to the belief that such a one would not, in the case supposed, be guilty of treason, also that a naturalized colonial would not be entitled to British protection while abroad.

In the report of the Inter-Departmental Committee on the Naturalization Law, presented to the Houses of Parliament July 24, 1901, it was recommended that "provision should be made by legislation enabling a Secretary of State, or the Governor of a British possession, to confer the status of a British subject upon persons who fulfil the requisite conditions in any part of the British Dominions, and that the status so conferred should be recognized by British law everywhere within and without His Majesty's dominions. This provision should be without prejudice to the power of the legislature of any British possession to provide for the conferring upon any persons under such conditions as it might see fit, the whole or any of the rights of British subjects within its own territory."

Since the foundation of the United States Government the function of admitting to citizenship has been vested by Congress exclusively in the courts, and that the proceedings thus provided for are essentially judicial in character, and may be constitutionally vested in the courts has never been questioned. As the court said in *Tutun v. United States*: <sup>10</sup> "If the proceedings were not a case or controversy within the meaning of Article III, paragraph 2 this delegation of power upon the courts would have been invalid. . . . Whether a proceeding which results in a grant is a judicial one does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant." Regarding the petitioner's claim in this case the court went on to say: "The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By section 11 of the Naturalization Act (Comp. St. § 4370) the full rights of a litigant are expressly reserved to it. See *In re Mudarri* (C. C.) 176 F. 465. Its contentions are submitted to the court for adjudication. See *Smith v. Adams*, 130 U. S. 167. Section 9 (Comp. St. § 4368) provides that every final hearing must be held in open court, that upon such hearing the applicant and witnesses shall be examined under oath before the court and in its presence, and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell v. Gordon*, 6 Cranch, 176; *Spratt v. Spratt*, 4 Pet. 393. It may not be collaterally attacked. *Pintsch Compressing Co. v. Bergin* (C. C.) 84 F. 140. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be canceled by suit. 'It is in this respect,' as stated in *Johannessen v. United States*, 225 U. S. 227, 'closely analogous to a public grant of land (Rev. Stat. § 2289 et seq. [Comp. St. § 4530]), or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat. § 4883 et seq. [Comp. St. § 9427]).'

"The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, § 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See *United States v. Shanahan* (D. C.) 232 F. 169, 171. There is, of course, no 'right to naturalization unless all statutory

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<sup>10</sup> 270 U. S. 568.

requirements are complied with.' *United States v. Ginsberg*, 243 U. S. 472; *Luria v. United States*, 231 U. S. 9. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent, and he must establish these allegations by competent evidence to the satisfaction of the court. In *re Bodek* (C. C.) 63 F. 813, 814, 815; In *re ———*, 7 Hill (N. Y.), 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor."

#### § 201. Administrative Proceeding.

Although the determination of the conditions under which citizenship by naturalization may be obtained is a legislative matter, and the granting of citizenship in conformity with such legislative policy is a judicial matter, there are administrative matters in connection with naturalization proceedings for the performance of which the Federal Government has found it desirable to establish in the Department of Labor a distinct service known as the Bureau of Naturalization. This Bureau "is charged with administrative supervision of the laws concerning the preparation and training of all alien-born applicants for citizenship and their admission to citizenship. It exercises a control of the process of admission to citizenship by representing the Government at the judicial hearings of naturalization proceedings of applicants for citizenship. It keeps the necessary records pertinent thereto, furnishes information to aliens and others regarding the status, rights, and obligations of citizens, and coöperates in the work of citizenship training by public schools throughout the United States."<sup>11</sup>

Congress may authorize, and for many years, has authorized, State courts to entertain naturalization proceedings, but there is, of course, no power on the part of the Federal Government to compel the exercise by such State courts of the power so granted.<sup>12</sup>

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<sup>11</sup> This statement is taken from the *Service Monograph* (p. 21) entitled "The Bureau of Naturalization," published by the Institute for Government Research. In Chapter I of this monograph will be found a brief history and the text of the Naturalization laws in the United States.

<sup>12</sup> The power of the Federal courts to set aside, upon the ground of fraud, a decree of naturalization granted by a State court, or to annul it by an injunction prohibiting giving effect to it, seems to have been for a time in doubt, as appears from some decisions rendered prior to the act of 1906 below quoted: *United States v. Norsch* (42 Fed. 417); *United States v. Gleason* (78 Fed. 396). Cf. article by Judge Henry Stockbridge, "The Law of Naturalization," in the *Green Bag*, XVII, 644. The act of June 29, 1906, Section 15, provides that "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for

It has been held that naturalization has a retroactive effect to the extent of removing liability to forfeiture of lands held during alienage.<sup>13</sup>

The naturalization of a father operates as a naturalization of his minor children if they are dwelling within the United States.<sup>14</sup> This same case holds that a declaration of a father of an intention to become naturalized gives to his children who attain their majority, before their father's naturalization is completed, an inchoate citizenship which, upon majority, may be repudiated. "Clearly," said the court, "minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance."

#### § 202. Naturalization by Annexation of Territory and by Treaty.

When territories are annexed either by treaty or by conquest, the status of their inhabitants is determined at the will of the annexing States. In all cases, however, in the absence of any treaty stipulations to the contrary, the annexation of a territory transfers to the annexing State the allegiance of its inhabitants, and makes them, from the view point of

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the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the Court in which such judgment or decree is rendered shall make an order cancelling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the Court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the Court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation." This provision has been held constitutional in *United States v. Simon* (170 Fed. 680). This section further provides that: "If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country and take permanent residence therein, it shall be considered a *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceedings to authorize the cancellation of his certificate of citizenship as fraudulent."

<sup>13</sup> *Manuel v. Wulff* (152 U. S. 505); *Governor's Heirs v. Robertson* (11 Wh. 332).

<sup>14</sup> *Boyd v. Nebraska* (143 U. S. 135).

other nations, the citizens of that State. Whether or not, however, they become its citizens in the stricter constitutional sense depends upon the municipal law of that country. This branch of the subject will be treated in the chapter dealing with "Citizenship in the Territories and Dependencies."

Besides naturalization by general acts, by treaty, and by conquest, there have been many instances in the United States of naturalization of specific individuals or groups of individuals by special acts of Congress.<sup>15</sup>

As already pointed out it is provided by statute that "all children heretofore born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The application of this principle to persons born in countries which, like the United States, claim as their own citizens all persons born within their limits, is to create a double citizenship.

Most European countries apply the doctrine of *jus sanguinis* in fixing citizenship. That is, they treat as their own citizens persons wherever born, whose parents are their citizens. In some cases also, they apply the *jus soli* as well, claiming as their own citizens persons born upon their soil of alien parents. This, for example, is the practice of France. Many States permit after majority an election to one born in one country of parents who are citizens of another; for example, France, Spain, Belgium, Greece, Bolivia, Italy, Portugal, Mexico, and Great Britain. The British Act of 1870 declares that "any person who is born out of Her Majesty's dominions, of a father being a British subject, may, if of full age, and not under any disability, make a declaration of alienage, . . . and, from and after the making of such declaration, shall cease to be a British subject." In default of such declaration he remains, by birth, a British subject.

Double citizenship is also created, as we shall see in those cases in which one country naturalizes the citizens of another country which does not admit the right of the individual to expatriate himself without the consent of the State of his natural allegiance.

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<sup>15</sup> Cf. Van Dyne, *Citizenship of the United States*, Chapter VI. See the same work, Chapter VI, for questions of citizenship connected with the admission of Territories as States, and also *Boyd v. Nebraska* (143 U. S. 135). In this case the court said: "Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community. So far as the original States were concerned, all of those who were citizens of such States became upon the formation of the Union citizens of the United States, and upon the admission of Nebraska into the Union 'upon an equal footing with the original States, in all respects whatsoever,' the citizens of what had been the Territory became citizens of the United States and of the State."

The difficulties and conflicting claims arising out of these cases of double allegiance have been numerous, and have usually been settled, each case upon its own merits, by way of compromise and upon doctrines of comity, rather than by the establishment of any very general principles. Thus it has been held upon numerous occasions by the executive branch of our government that our law cannot operate to relieve such persons from their allegiance to the countries in which they are born so long as they remain in such countries. It has also been generally held that where a naturalized American citizen returns to his native country, he may be held bound by such obligations, as, for example, the rendition of military service, as may have been due by him at the time of his departure from his native country.<sup>16</sup>

### § 203. Conclusiveness of Naturalization Proceedings.

A certificate of naturalization, though secured from a competent court, is not conclusive as against the public so as to prevent its cancellation, on the ground of fraud, or illegally procured perjured testimony, as authorized by United States statute.<sup>17</sup> In *Johannessen v. United States*,<sup>18</sup> in a proceeding instituted by the United States under this statute, the court upheld its constitutionality, and, in the course of its opinion, pointed out that the foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court, and therefore that it did not apply to naturalization proceedings which, though judicial in character were not proceedings in which the Government appears as an adversary to the petitioner. The court said: "It is plain that while a proceeding for the naturalization of an alien is, in a certain sense, a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the government a party nor to give any notice to its representatives. . . . Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public. Such a certificate, including the 'judgment' upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant

<sup>16</sup> Cf. W. S. Tingle, *Germany's Claims Upon German Americans in Germany*, Philadelphia, 1903.

<sup>17</sup> 34 Stat. at L. 596, 601. Act of June 29, 1906.

<sup>18</sup> 225 U. S. 227.



of land (Rev. Stat. § 2289, etc., U. S. Comp. Stat. 1901, p. 1388), or of the exclusive right to make, use, and vend a new and useful invention. . . . The views above expressed render it unnecessary for us to go into the question whether, on general principles, and without express legislative authority, a court of equity, at the instance of the government, might set aside a certificate of citizenship or restrain its use, for fraud or the like."

By Section 15 of the act of 1906 it is provided:

"If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship, and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship. . . . The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

In *Luria v. United States*<sup>19</sup> it was held that these provisions were constitutional. After reviewing the conditions which must be met by the alien before being entitled to citizenship, the court said: "These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as name,—that he should assume and bear the obligations and duties of that status, as well as enjoy its rights and privileges. . . . By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking those of citizenship here, or by one whose purpose was to reside permanently in a foreign country, and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part

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<sup>19</sup> 231 U. S. 9.



of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed."

As to the provision of the statute that permanent residence abroad within five years after the issuance of the certificate of naturalization was to be deemed *prima facie* evidence of a lack of intention to become a permanent citizen of the United States, the court pointed out that the provision prescribed a rule of evidence and not of substantive right,—that it went no further than to establish a rebuttable presumption. As to the constitutionality of establishing, by legislation, such a rule, the court referred to the opinion in the case of *Mobile, J. & K. C. R. Co. v. Turnipseed*<sup>20</sup> in which it had been declared: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

#### § 204. Who May Be Naturalized: Free White Persons and Negroes.

Since the first years of the Government Congress has provided for the naturalization of "free white persons," and this provision was not changed until the act of 1870 extended the right "to aliens of African Nativity and to persons of African Descent," and this remains the law at the present time.

#### § 205. American Indians.

Indians have been held not to be included in the above classes, and, therefore, they have been eligible for naturalization only under special statutes. The constitutional status of Indians in the United States is discussed in a later chapter,<sup>21</sup> but it may be here said that, by the act of June 2, 1924,<sup>22</sup> it is provided that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."

<sup>20</sup> 219 U. S. 35.

<sup>21</sup> Chapter XXI.

<sup>22</sup> 43 Stat. at L. 253.

**§ 206. Chinese.**

The Chinese have been held to be not included within the classes of free white persons or negroes or persons of African descent, and, therefore, not eligible to citizenship.<sup>23</sup> Because thus ineligible, it has been held that a Chinese woman does not become a citizen of the United States by reason of marriage to an American citizen.<sup>24</sup>

**§ 207. Japanese.**

For the same reasons that Chinese have been held not eligible to American citizenship the Japanese have been denied naturalization. This was held in 1894, in *Re Sarto*,<sup>25</sup> and has since been reaffirmed by the Supreme Court in *Takao Ozawa v. United States*,<sup>26</sup> and in *Toyota v. United States*.<sup>27</sup> In the first of these cases it was urged upon the court that the phrase "free white persons" as used by the framers of the act of 1790 in which it was first employed, was intended only to exclude Indians and negroes, and that such intent should be given effect to. The court, however, declared that "it is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. . . . It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded."

The question was thus reduced to the ascertainment of the meaning to be given to the term "free white persons." As to this the court declared that the term "white" imports a racial and not an individual test—"manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter-hued persons of the brown or yellow races." What, then, is the meaning to be given to the term "white persons"? By an unbroken line of decisions, beginning with *In re Ah Yup* <sup>28</sup> the court declared the words "white persons" have been declared to indicate only persons of

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<sup>23</sup> See *In re Ah Yup* (5 Sawy. 155), in which this was held and which has not since been questioned.

<sup>24</sup> *Chang Chan et al. v. Nagle* (268 U. S. 346).

<sup>25</sup> 62 Fed. 126.

<sup>26</sup> 260 U. S. 178. Reaffirmed in *Yamashita v. Hinkle* (260 U. S. 199).

<sup>27</sup> 268 U. S. 402.

<sup>28</sup> 5 Sawy. 155.

what is popularly known as the Caucasian Race. But this, the court pointed out, while simplifying the problem, does not entirely dispose of it, for the effect is only to indicate "a zone of more or less debatable ground." "Individual cases falling within this zone must be determined as they arise by what the court has called, in another connection,<sup>29</sup> 'the gradual process of judicial inclusion and exclusion.'"

In *Toyota v. United States*<sup>30</sup> it was held that a Japanese was not intended to be included by Congress among those aliens who, by the act of July 19, 1919,<sup>31</sup> or that of June 29, 1906, as amended by the act of May 9, 1918,<sup>32</sup> were declared entitled to citizenship by reason of service in the military or naval forces of the United States. The principal purpose of those acts, the court declared, was to facilitate the naturalization of service men of the classes specified, but there was no indication of an intention to eliminate from the definition of eligibility to citizenship of the distinction based on color or race.

#### § 208. East Indians: Hindus.

The most careful examination by the Supreme Court of the meaning to be given to the term "white persons" is that contained in the opinion in the case of *United States v. Bhagat Singh Thind*,<sup>33</sup> in which it was held that a high-caste Hindu is not a "white person" within the meaning of the Naturalization Act.

The court first pointed out that the term "Caucasian Race" which, as popularly used, was to be held synonymous with "white persons" as employed in the Naturalization Acts, had not appeared in these acts, and had been adopted by the court only as an aid in determining the intent of the statutory term of "white persons." Indeed, said the court, the term Caucasian as used in the science of ethnology has not a clear connotation. In popular use in America, however (and it was this common usage the court had availed itself of for the interpretation of the Naturalization Statutes), the meaning of the term Caucasian had become clear enough to indicate that it had a narrower scope than it had in its scientific employment. And, said the court, when "race" is spoken of, for the practical purposes of the statute, it must refer to a group of now living persons with common characteristics rather than to groups of persons who have, or are supposed to have, descended from some remote common ancestor; hence, in determining whether or not persons belong to the Caucasian or other race, "the question is not, therefore, whether by the

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<sup>29</sup> *Davidson v. New Orleans* (96 U. S. 97).

<sup>30</sup> 268 U. S. 402.

<sup>31</sup> 41 Stat. at L. 222.

<sup>32</sup> 40 Stat. at L. 542.

<sup>33</sup> 261 U. S. 204.

speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category of white persons.” “It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.”

As for the suggestion that the terms Aryans and white persons might be deemed synonymous, the court pointed out that the former term has to do with linguistic and not at all with physical characteristics.

In further definition of what the original framers of the naturalization statute understood by white persons, the court said: “The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to ‘any alien being a free white person’ it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when section 2169, re-enacting the naturalization test of 1790, was adopted and, there is no reason to doubt, with like intent and meaning.

“What, if any, people of primarily Asiatic stock come within the words of the section we do not deem it necessary now to decide. There is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included.”

The opinion concluded: “It is not without significance that Congress by the act of February 5, 1917,<sup>34</sup> has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.”

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<sup>34</sup> 39 Stat. at L. 874.

**§ 209. Burmans.**

In *Re Po*,<sup>35</sup> it was held that a native of British Burma was a Malay, and, therefore, not a "white person," and not entitled to become naturalized.

**§ 209a. Parsees, Syrians, Armenians, Mexicans, etc.**

In the lower Federal courts it has been held that Parsees, Syrians, Armenians, Mexicans, come within the class of "white persons," and, as such, are eligible to citizenship.<sup>36</sup>

**§ 210. Alien Enemies.**

Since the act of Congress of 1798, aliens, being natives, citizens or denizens of a country with which the United States is at war, are not eligible to naturalization as American citizens.

**§ 211. Alien Veterans of the World War.**

By act of May 26, 1926,<sup>37</sup> it was provided that an alien veteran of the World War, if residing in the United States, should be entitled, at any time within two years after the enactment of the law, to naturalization upon the same terms, conditions and exceptions which would have been accorded to such alien if he had petitioned before the Armistice of 1918, except that he would not be required to appear and file his petition in person and to take the prescribed oath of allegiance in open court.

**§ 212. Inhabitants of Dependencies of the United States.**

As will elsewhere appear, the United States may have sovereignty over areas which, however, are not "incorporated" into the United States. The natives or citizens of these unincorporated areas are nationals or subjects of the United States when viewed in a broad international sense, but they are not necessarily "citizens" of the United States within the narrower sense of American constitutional or statute law. This has been specifically held as to the inhabitants of these dependencies at the time of their annexation to the United States, and with regard to which at the time of annexation express provision was not made that such inhabitants should become citizens of the United States. By a parity of reasoning, it would appear that persons born in such annexed areas after the date of their annexation did not become, by the operation of the Fourteenth Amendment, citizens of the United States, for, though born subject to the jurisdiction of the United States, they were not born "in the United

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<sup>35</sup> 28 N. Y. Supp. 383.

<sup>36</sup> *In re Rodriguez* (81 Fed. 337); *In re Halladjian* (174 Fed. 834); *U. S. v. Balsara* (180 Fed. 694); *In re Mudarri* (176 Fed. 445); *In re Kanaka Nian* (6 Utah, 359); *In re Camille* (6 Fed. 256).

<sup>37</sup> 44 Stat. at L. 655.

States." This precise question was not before the court in the *Insular* case of *Downs v. Bidwell*,<sup>38</sup> but the logic of the decision in that case would seem to lead to the conclusion that persons born in such unincorporated areas, whether before or after their annexation to the United States, were not to be deemed, without express treaty or congressional provision to that effect, citizens of the United States. In the course of his opinion in that case Mr. Justice Brown, after quoting the citizenship clause of the Fourteenth Amendment, said: "Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'" And, later: "We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children, thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States."

### § 213. Filipinos.

The treaty of peace which transferred the sovereignty over the Philippine Islands from Spain to the United States did not provide for the collective naturalization as American citizens of the inhabitants of those Islands. As is pointed out in the next section, the citizens of Porto Rico have since been made American citizens by act of Congress. This, however, has not been done with reference to the Filipinos who, therefore, remain citizens of the Philippine Islands, and not American citizens except in a broad international sense. However, by Section 30 of the act of Congress of June 29, 1906, provision is made for the naturalization of persons owing permanent allegiance to the United States, and, though there has been some difference of judicial opinion, it would appear that Filipinos may be naturalized under this provision.<sup>39</sup>

<sup>38</sup> 182 U. S. 244.

<sup>39</sup> See especially *In re Bautista* (245 Fed. 765). Cf. also, Malcolm, *Philippine Constitutional Law* (2d ed.), p. 397. Section 30 of the act of 1906 reads: "All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall

**§ 214. Porto Ricans.**

The treaty of peace with Spain of 1898, which provided for the transfer of the sovereignty over Porto Rico and the Philippine Islands to the United States did not provide for the collective naturalization of the inhabitants, but, instead, merely provided that Spanish subjects, natives of Spain, residing in these Islands, might preserve their allegiance to the Crown of Spain by making a declaration within a year of their desire to preserve such allegiance, in default of which declaration they were to be held to have renounced it and to have adopted the "nationality of the territory in which they may reside," and that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." It was later judicially held, as elsewhere appears, that these natives of the Islands and those native Spaniards, inhabitants of the Islands who did not preserve their Spanish nationality, became citizens of Porto Rico or citizens of the Philippine Islands, as the case might be, but not citizens of the United States except as regarded from the international point of view.

By act of Congress of March 2, 1917,<sup>40</sup> it was provided that Porto Rico citizens were to be deemed United States citizens. They were thus collectively naturalized by statute.

**§ 215. Hawaiians.**

The Hawaiian Islands came under the sovereignty of the United States by the Joint Resolution of Congress of July 7, 1898.<sup>41</sup> This Resolution made no mention as to the status to be enjoyed by inhabitants of the Islands. By act of April 30, 1902,<sup>42</sup> the Islands were declared to constitute the Territory of Hawaii, and the declaration made (Section 4) "That all persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

**§ 216. Virgin Islands, Inhabitants of.**

By act of February 25, 1927, the following persons and their children born subsequent to January 17, 1917, are declared to be citizens of the

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not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law." 34 Stat. at L. 596.

<sup>40</sup> 39 Stat. at L. 953, Sec. 5. See also act of March 4, 1927, as to persons born in Porto Rico of alien parents. 44 Stat. at L. 1418.

<sup>41</sup> 30 Stat. at L. 750.

<sup>42</sup> 31 Stat. at L. 141.

United States: "(a) All former Danish citizens who, on January 17, 1917, resided in the Virgin Islands of the United States and are now residing in those islands or in the United States or Porto Rico, and who did not make the declaration required to preserve their Danish citizenship by article 6 of the treaty entered into on August 4, 1916, between the United States and Denmark, or who, having made such a declaration, have heretofore renounced or may hereafter renounce it by a declaration before a court of record:

"(b) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and are now residing in those islands or in the United States or Porto Rico, and who are not citizens or subjects of any foreign country; and

"(c) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and are now residing in the Virgin Islands of the United States, and who are not citizens or subjects of any foreign country."

The same act also provides: "All persons, born in the Virgin Islands of the United States on or after January 17, 1917 (whether before or after the effective date of this Act), and subject to the jurisdiction of the United States, are hereby declared to be citizens of the United States." <sup>43</sup>

#### **§ 216a. American Women Marrying Foreigners, and Foreign Women Marrying American Citizens.**

By the act of March 2, 1907, it was provided that American women marrying foreigners should take the nationality of their husbands, but that, at the termination of the marital relation, they might resume their American citizenship, if abroad, by registering as such with a consul of the United States, or, if residing in the United States at the time of the termination of the marital relation, by continuing to reside therein. The act also provided (Section 4) that foreign women who acquired American citizenship by marriage with American citizens, should be assumed to

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<sup>43</sup> Article 6 of the Treaty with Denmark under which the Virgin Islands were acquired by the United States provided that those Danish citizens residing and remaining in the Islands might preserve their Danish citizenship by making before a court of record, within one year from the exchange of ratifications of the treaty a declaration of their decision to preserve such citizenship; in default of which declaration they were to be deemed to have renounced it and to have accepted American citizenship. For children under eighteen years of age this declaration could be made by their parents. It was, however, further provided: "Such election of Danish citizenship shall however not, after the elapse of the said term of one year, be a bar to their renunciation of their preserved Danish citizenship and their election of citizenship in the United States and admission to the nationality thereof on the same terms as may be provided according to the laws of the United States, for other inhabitants of its Islands. The civil rights and the political status of the inhabitants of the Islands shall be determined by Congress, subject to the stipulations contained in the present Convention."



retain this citizenship after the termination of the marital relation, if they continued to reside in the United States, unless they should make formal renunciation thereof; or, if residing abroad, that they might retain this citizenship by registering as such before a United States consul within one year after the termination of the marital relation. The Sections 3 and 4 of the act of 1907 were repealed by the act of September 29, 1922.

By this act of September 22, 1922, entitled "An Act Relative to the Naturalization and Citizenship of Married Women" (1) it is provided that the right of a woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman; that any woman marrying a citizen of the United States, or any woman whose husband is naturalized after the passage of the act, shall not become a citizen of the United States by reason of such marriage or naturalization, but, if eligible to naturalization, she may be naturalized by complying with all requirements of naturalization law, except that no declaration of intention is to be required, and, in lieu of the requirement of five years of residence in the United States and one year of residence in the State where the naturalization court is held, one year's continuous residence in the United States, Hawaii, Alaska, or Porto Rico will be sufficient; that a woman of American citizenship shall not lose her citizenship by reason of her marriage, after the passage of the act, unless she makes formal renunciation thereof; provided, however, that one marrying an alien ineligible to American citizenship shall lose her citizenship; that if, at the termination of the marital status, a woman is an American citizen, she shall retain her citizenship regardless of her residence; that if, during the continuance of the marital status she resides continuously two years in a foreign State of which her husband is a citizen, or for five years continuously outside the United States, she shall come under the same presumption as that provided for naturalized citizens of the United States by Section 2 of the act of 1907. No woman whose husband is not eligible to citizenship may be naturalized during the continuance of the marital status.

#### § 216b. Children.

The act of 1907 provides that children born outside the United States of alien parents are to be deemed citizens of the United States by virtue of the naturalization of, or the resumption of American citizenship by the parent, provided such naturalization or resumption takes place during the minority of the children, and, provided further, that such citizenship of a minor child should begin at the time when such child begins to reside permanently in the United States.

The act of 1907 also provided that:

"All children born outside the limits of the United States who are citizens thereof in accordance with the provisions of Section 1993 of the Revised

Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take an oath of allegiance to the United States upon attaining their majority."

## CHAPTER XX

### EXPATRIATION <sup>1</sup>

#### § 217. The Right of Expatriation.

Until comparatively recent times, except in the United States, the right of a citizen to cast off his natural allegiance, the allegiance into which he is born, was generally denied by the States of the world.

This denial was made, but not always enforced in practice, in England down to the time of her Naturalization Act of 1870. Blackstone in his *Commentaries* declared: "It is a principle of universal law that the natural-born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince."

The statute 3 Jac. 1, chap. 4, provided that promising obedience to any other prince, State, or potentate, subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason.

In respect to the naturalization law of the United States, passed in 1795, Lord Grenville wrote to our minister, Rufus King: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part."<sup>2</sup>

The assertion by England of this principle with reference to her subjects who had become naturalized American citizens was one of the causes of the War of 1812. <sup>3</sup>

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<sup>1</sup> In addition to the general authorities on citizenship, see Chapter VII of Moore's *American Diplomacy*, and the address of Hon. Oscar S. Straus entitled "The United States Doctrine of Citizenship and Expatriation" before the American Social Science Association, 1901.

<sup>2</sup> 2 Am. State Pap., p. 149; *Fitch v. Weber* (6 Hare, p. 51).

<sup>3</sup> Moore (*Op. cit.*, p. 173) calls attention to the fact that the dispute over impressment as a whole did not involve the crucial point of the later controversies as to ex-

In a proclamation issued in 1807, the King declared: "Now we do hereby warn all mariners, seafaring men, and others our natural-born subjects, that no such letters of naturalization or certificates of citizenship do or can in any manner divest our natural-born subjects of the allegiance or in any degree alter the duty which they owe to us, their lawful sovereign."

In the Treaty of Ghent which marked the conclusion of this war no mention, one way or the other, was made of this English doctrine; but in future England ceased to enforce her claims in an arbitrary manner against English born, but American naturalized, citizens.

By the act of 1870 England definitely abandoned the doctrine. By that statute it is recognized that by voluntarily assuming citizenship in another State, British citizenship is lost, though such change of allegiance is not to operate to discharge the expatriated one from liability for acts or defaults committed prior to expatriation. The act also provides for the naturalization of resident aliens of countries whose laws or treaties permit expatriation, and declares such naturalized citizens entitled to the protection of Great Britain everywhere except in the countries of their original allegiance.

By a number of foreign States, among them Turkey and Russia, the doctrine of inalienable allegiance is still asserted. In many others it is partially upheld. With most of these countries the United States has entered into special treaties governing the subject of naturalization.<sup>4</sup>

#### § 218. Right of Expatriation Recognized by United States.

Since 1868 the right of expatriation has been uniformly asserted by all the departments of the United States Government. Prior to that time, the executive, judicial, and legislative branches were not always in harmony upon this point. During the early years, the executive branch of the government, while asserting the right of aliens to become naturalized citizens of the United States, did not affirm that this change in political status

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patriation. "The burden of the complaint in regard to impressment," writes Moore, "as defined in Madison's war message of June 1, 1812, was that Great Britain sought, under cover of belligerent right, to execute her municipal law of allegiance on board the ships of other countries on the high seas, where no laws could operate 'but the laws of the country to which the vessels belong.' Precisely the same position was maintained by Webster in his correspondence with Lord Ashburton in 1842. Ships on the high seas are treated, for purposes of jurisdiction, as if they were part of the territory of the nation to which they belong. The complaint that the British Government enforced the English law of allegiance on board of American vessels on the high seas was manifestly a different theory from objecting to her enforcement of the same law within British jurisdiction."

<sup>4</sup> For the various attitudes of, and treaty relations with, foreign States, see Moore, *Digest of International Law*, Vol. III; Van Dyne, *Citizenship*, Pt. IV, Chap. II; *The American Passport*, pp. 127 *et seq.*; and Report on Citizenship of the United States, Expatriation, and Protection Abroad, 59th Cong., 2d Sess., H. Doc. 326.

should be recognized by the States of their respective original allegiance. Mr. Jefferson as Secretary of State in 1793 wrote: "Our citizens are certainly free to divest themselves of that character by emigrating, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do."<sup>5</sup> A little later, Marshall, as Secretary of State, while affirming the right of an alien without the consent of his native State to seek naturalization, observed that other States should recognize such naturalization "unless it be one which may have a conflicting title to the person adopted." At various times the Executive Department of the United States Government asserted that a naturalized American citizen was entitled, while abroad, to the same protection at the hands of the American Government as that to which a native-born citizen was entitled. Mr. Buchanan was, however, the first Secretary of State to declare in unqualified terms that the naturalized American citizen was entitled to the full protection of the American Government while abroad, and even in the State of his original allegiance, whatever might be the doctrines and laws of that country with reference to expatriation.<sup>6</sup>

Later Secretaries of State did not continue to state the American doctrine as absolutely as had Buchanan. Since 1868, however, an express legislative declaration has prevented the Executive Department from qualifying the doctrine in words, but, in fact, it has not been rigorously applied in cases where neither justice nor expediency has demanded it.

Since the first years of the Constitution the legislation of Congress upon the subject of naturalization has implied the right of expatriation. By the act of 1868 which is still in force, the right of expatriation is explicitly declared in the most unqualified manner. "Whereas," the act reads, "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the

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<sup>5</sup> Jefferson's Works (Washington ed.), IV, 37.

<sup>6</sup> Moore (*Am. Dig.*, p. 174) writes: "A comprehensive examination of our unpublished diplomatic records enables me to say that the first Secretary of State to announce the doctrine of expatriation in its fullest extent—the doctrine that naturalization in the United States not only clothes the individual with a new allegiance but also absolves him from the obligations to the old—was James Buchanan."

In 1848, writing to the American minister in London, Buchanan said: "We can recognize no difference between the one and the other, nor can we permit this to be done without protesting and remonstrating against it in the strongest terms. The subjects of other countries who from choice have abandoned their native land, and, accepting the invitation which our laws present, have emigrated to the United States and become American citizens, are entitled to the very same rights and privileges as if they had been born in the country. To treat them in a different manner would be a violation of our plighted faith as well as our solemn duty."

rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disallowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens."<sup>7</sup>

The enforcement, or rather the attempted enforcement, of this legislative declaration has led the diplomatic branch of our government into many difficulties. With reference to a considerable number of countries these difficulties have in a great measure been obviated by the negotiation with them of naturalization treaties.

Judicial decisions in the United States as to the existence of a right of expatriation in the absence of statutes creating it have not been uniform. In *Talbot v. Janson*,<sup>8</sup> decided in 1795, Justice Iredell denied that the individual had a right of expatriation at will. So also in *Murray v. The Charming Betsey*,<sup>9</sup> *The Santissima Trinidad*,<sup>10</sup> *Inglis v. Sailor's Snug Harbor*,<sup>11</sup> *Shanks v. Dupont*,<sup>12</sup> the court, while not in each instance passing directly upon the point, showed an inclination to accept the common-law principle which denied the existence of an individual right of expatriation. This same ground was taken by Chancellor Kent in his *Commentaries*.<sup>13</sup> In *M'Ilvaine v. Coxe*,<sup>14</sup> however, it was held that persons born in the colonies and remaining in the country and giving their allegiance to the new governments after the Declaration of Independence were released from their British allegiance and came under the protection of and bound in allegiance to the newly established American governments. Since 1868 the courts have not questioned the right of the citizen voluntarily to expatriate himself and become a citizen of another country.<sup>15</sup>

<sup>7</sup> Rev. Stat., Secs. 1999, 2000.

<sup>8</sup> 3 Dall. 133.

<sup>9</sup> 2 Cr. 64.

<sup>10</sup> 7 Wh. 283.

<sup>11</sup> 3 Pet. 99.

<sup>12</sup> 3 Pet. 242.

<sup>13</sup> Lecture XXV.

<sup>14</sup> 2 Cr. 280; 4 Cr. 209.

<sup>15</sup> See Moore, *Digest of International Law*, III, Sec. 433, and authorities there cited. See also article by Slaymaker entitled "The Right of the American Citizen to Expatriate" in *The American Law Review*, XXXVII, 191.

The following convenient summary of the attitudes of various foreign governments with reference to the subject of expatriation is given in the Report of the Citizenship Commission. (H. R. Doc. 326, 59th Cong., 2d Sess., p. 12.)

A. The right of voluntary expatriation is wholly denied. A subject has no right to leave the territory of his origin without the express permission of his sovereign; he may not renounce his original allegiance or assume another, and upon his return to

The United States has suffered considerably from the practice of foreigners obtaining American citizenship by naturalization but without any bona fide intention of remaining permanently in the United States. In other words, after obtaining American citizenship, these persons have, in many cases, taken up foreign residence and, nevertheless, continued to claim the benefits of their acquired American citizenship. Especially has this procedure been resorted to by aliens in order to escape from their liability to service in the armies of the countries of their original citizenship.

By Section 15 of the Naturalization Act of June 29, 1906,<sup>16</sup> Congress provided: "If any alien who shall have secured a certificate of naturalization under the provisions of this Act shall within five years after the issuance of such certificate, return to the country of his nativity, or go to any foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdiction who have such certificates of citizenship and who have taken permanent residence in the

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the jurisdiction of his origin he is liable to arrest and punishment. (For example, this is the attitude of Russia and Turkey.)

B. The right of expatriation is admitted, provided there exists at the time no unperformed obligation to military service; but, in case this obligation exists, naturalization in a foreign country obtained before it is discharged is considered as void. (For example, this is the attitude of France.)

C. The right of expatriation is admitted, but naturalization in a foreign country does not become valid from the point of view of the country of origin without an express and formal renunciation of the original citizenship made in the country of origin and in accordance with its forms of law. (For example, this is the attitude of Switzerland.)

D. The right of expatriation is admitted, but, while naturalization abroad is freely allowed, in case of a return to the country of origin the person thus naturalized is not denied the rights of citizenship in that country, but is permitted without further formality to retain his rights as a citizen as if he had never departed from the country. (For example, this is the attitude of Venezuela.)

E. The right of expatriation is admitted, and citizenship absolutely ceases (although it may afterward be legally recovered) at the moment when the act of naturalization in a foreign country is performed. (This is the attitude of the majority of foreign governments.)

F. The right of expatriation is admitted and is assumed to have been accomplished when a citizen absents himself from the parent country for a prolonged period of years. (For example, this is the attitude of the Netherlands.)

<sup>16</sup> 36 Stat. at L. 596.

country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship." <sup>17</sup>

By act of March 2, 1907,<sup>18</sup> Congress for the first time provided a statutory mode of throwing off one's American citizenship. Section 2 of that act provides: "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he has taken an oath of allegiance to any foreign State. When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war." <sup>19</sup>

In a number of treaties to which the United States is a party it is provided that, when naturalized citizens, originally citizens of the other party States, return to the States of their original citizenship, *animo manendi*, they lose their naturalized citizenship, and, in most cases, it is provided that a residence of two years of such foreign residence shall be deemed prima facie evidence of this intention to remain abroad.

#### § 219. Expatriation May Be Controlled by Law.

What has been said in the preceding sections has had reference to the right of a citizen, by voluntary action upon his part, to expatriate himself. The law is clear that, whatever this right may be, it is subject to full control by the Government, both affirmatively and negatively. That is, the Government may provide that certain acts upon the part of the citizen may be punished by a denial to him or her thenceforth of the rights and privileges of American citizenship, or may be deemed to operate as renunciation of his or her American citizenship. This has appeared in the preceding chapter which has dealt with American citizenship. Furthermore, it is established that no one may abandon his or her American citizenship

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<sup>17</sup> For a construction of this provision, see the opinion of Mr. Justice Van Devanter in the case of *Luria v. United States* (231 U. S. 9).

<sup>18</sup> 34 Stat. at L. 1228.

<sup>19</sup> The second paragraph of this section gave statutory effect to a practice which the Department of State had, in fact, followed for many years. As to this whole subject, see two excellent articles by R. W. Flournoy, Jr., Assistant Solicitor for the Department of State, entitled "Naturalization and Expatriation" in 3 *Yale Law Journal* (1921-1922), pp. 702, 848.



without the consent of the Government. In the early case of *Shanks v. Dupont* <sup>20</sup> this doctrine was declared and has not since been questioned. In that case the court said: "The general doctrine is, that no persons can by any act of their own, without the consent of the Government, put off their allegiance, and become aliens." In other words, the Government has the same control over the denial of a continuance of citizenship that it has over the creation or recognition of that status.<sup>21</sup>

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<sup>20</sup> 3 Pet. 242.

<sup>21</sup> *Cf. MacKenzie v. Hare* (239 U. S. 299).

## CHAPTER XXI

### INDIANS

The question of the legal status of Indians, which for many years, and especially during the last quarter of the nineteenth century, decreased in practical importance, has, since the annexation of the Philippine Islands, gained a new constitutional value for the reason that upon the islands there are many tribes which for years to come it may be necessary to govern in ways analogous to, if not identical with, those which, in the past, we have employed in the control of the red men in the United States proper. It will, therefore, be well to treat this subject rather more particularly than we should otherwise have done.

The legal relations of the Indians to the various governments, established by their white conquerors, have had reference, broadly speaking: (1) to their political status either as tribes or as individuals, and (2) to their rights to the lands occupied by them.<sup>1</sup>

#### § 220. The Legal Status of Indian Tribes.

From the first settlement of the American colonies the Indians were treated as alien peoples outside of the control of domestic laws. No attempt was made to interfere with their domestic affairs or systems of self-government, except to endeavor to keep out the agents of other European powers who might engage them in foreign alliance. When their lands were desired, they were purchased and not confiscated. Purchases by individuals, however, were not permitted except with governmental permission. Thus, typical is the proclamation of the King of England in 1763 after the ratification of the Articles of Peace with France, in which it was declared: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under dominion, for the use of the said Indians, all the lands and territory lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid, in pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained. And we do further strictly

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<sup>1</sup> Generally, with regard to the administration of Indian affairs and of the problems connected therewith, see the two publications of the Institute for Government Research (Washington, D. C.); *The Problem of Indian Administration*, by Lewis Meriam and others, and *The Office of Indian Affairs*, by L. F. Schmeckebier.

enjoin and require all persons whatsoever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

In July, 1775, the first action looking to a national, that is, an inter-colonial management of Indian affairs was taken when the Continental Congress resolved "that the securing and preserving the friendship of Indian nations appears to be a subject of the utmost moment to these colonies," and provided for three Indian departments with commissions in each "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

In the Declaration of Independence the Indian question figured, it being charged against the British King that he had endeavored "to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions."

In the Articles of Confederation the Congress of the United States was given "the sole and exclusive right and power . . . of regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated."

The phrase "not members of any of the States," here used, had reference to those Indians who had separated from their tribes and become mixed in the general citizen populations of the several States. It was intended also to except from national control those Indians who, though still in tribes, had become surrounded by the whites. The exception, indeed, from Federal control of these isolated and surrounded Indian tribes, and their absolute subjection to State authority continued under the Constitution of 1789, and when, in 1802, a general statute was passed for the government of the Indians, it was provided that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual States." Thus States like New York, Massachusetts, and Maine were permitted to continue to deal according to their discretion with Indian tribes within their borders. "As a dry matter of power," observes Thayer, "Congress might at any time have taken control of them [for as we shall see, the Constitution gives to the Federal Government full authority over the Indians so long as they remain distinct from the citizen bodies of the several States]. But while Congress was staying its hand, it might happen

and has happened in Massachusetts, that the tribal relation had been dissolved."<sup>2</sup>

The Constitution says nothing with regard to the legal status of the Indians or of the Indian tribes. The only reference to them is in the commerce clause, the force of which is considered in a later section.<sup>3</sup> As has already been seen, prior to the adoption of the Constitution, the Indian tribes had been treated as independent or quasi-independent political bodies, and it would appear that the framers of the Constitution had taken it for granted that, after the inauguration of the new government, this would continue to be their status and therefore that they were to be dealt with by the Federal Government by means of treaties and under the treaty-making powers of the Federal Government. And this, in fact, was the procedure followed.

#### § 221. Congressional Legislation.

By the act of March 30, 1802, consolidating, revising, and reënacting various prior laws, and entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," a system of regulation was established which remained largely in force for many years. By Section 1, the boundary lines between the United States and the various Indian tribes according to treaties entered into with them were laid down. By following sections it was provided that no citizen of or other person resident in the United States should, under penalty of one hundred dollars, or imprisonment for six months, enter the Indian territory without a passport; that robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian, "which would be punishable, if committed within the jurisdiction of any State against a citizen of the United States," was to subject the offender to fine and imprisonment; that when Indian property was taken or destroyed, the offender should be liable in a sum double its value; that no settlements by citizens or other persons should be made on any lands belonging to the Indians; that no traders should reside in Indian settlements without a license; that "no purchase, grant, lease, or other conveyance of lands, or of any title of claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

"In order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship," Section 13 declared it lawful for the President of the United States "to cause them to be fur-

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<sup>2</sup> "A People Without Law." Two articles in the *Atlantic Monthly* for October and November, 1891. The author is much indebted to these articles of this eminent jurist. The reference to Massachusetts is to the law of that State, of 1869, which declared every Indian in that State to be a citizen of the State.

<sup>3</sup> Section 226.

nished with useful domestic animals, and implements of husbandry, and with goods or money, as he may judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: provided, that the whole amount of such presents and allowance to such agents shall not exceed \$15,000 per annum."

In the event of Indians crossing the boundaries of their lands into the States and Territories of the United States and committing crimes of violence or stealing or destroying property, report was to be made to the tribes to which the offenders belong, and in case the tribes should refuse to make satisfaction, the President of the United States was to be notified and he was to take such steps to compel satisfaction as might be necessary. In no case were the individuals who were injured to attempt redress by private warfare. The superior courts in each territorial district and other Federal courts were given full jurisdiction to hear and determine all offenses against the act. Offenders found within any State or territorial district might be apprehended. The vending or distributing of spirituous liquors among the Indians was forbidden. And, finally, as quoted above, it was declared that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States."<sup>4</sup>

From this act it will be seen that the tribal Indians were treated as peoples not within the citizen bodies of the States and Territories, and that no attempt was made to regulate anything but the relations between them and outsiders. The relations of individual Indians to one another and to their respective tribal authorities were left untouched.

By act of March 3, 1817, Congress declared: "That if any Indian, or other person or persons, shall, within the United States, and within any town, district or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offence, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offences, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States. . . . Provided that nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or extend to any offence committed by one Indian against another, within any Indian boundary."

From time to time additional acts of Congress were passed for the regulation of the Indians, all of them predicated upon the idea that the Indians

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<sup>4</sup>2 Stat. at L. 139.

living upon Indians lands <sup>5</sup> constituted a class apart with a peculiar status, jurisdiction over whom was exclusively in the General Government.

§ 222. *Cherokee Nation v. Georgia.*

What effect the view of the Indian tribes as independent or quasi-independent political communities would have upon the constitutional powers of the States to deal with the Indians living within their respective borders did not come up for serious discussion in the Supreme Court until 1831 in the case of the *Cherokee Nation v. Georgia*.<sup>6</sup> This case came before the court on a motion on behalf of the Cherokee Nation of Indians for a subpoena and for an injunction to restrain the authorities of the State of Georgia from executing the laws of the State within the Cherokee territory as designated by a treaty between the United States and the Cherokee Nation. The case, however, was not decided on its merits, the majority of the court, including Chief Justice Marshall, holding that the Cherokee Nation was not a foreign State within the meaning of the clause of the Constitution which extends the Federal judicial power over controversies "between a State or the citizens thereof, and foreign States, citizens, or subjects," and gives to the Supreme Courts original jurisdiction in cases in which a State is a party. It was held, therefore, that the court was without power to entertain the suit.

Upon this point, Marshall in his opinion said: "Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory, and an act of hostility. These considerations

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<sup>5</sup> In *Bates v. Clark* (95 U. S. 204) "Indian lands" were defined by the Supreme Court to be "all the country to which the Indian title has not been extinguished anywhere within the limits of the United States."

<sup>6</sup> 5 Pet. 1.

go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign States."<sup>7</sup>

§ 223. *Worcester v. Georgia.*

In the great case of *Worcester v. Georgia*,<sup>8</sup> decided in 1832, the question of the political status of the Indians again came before the Supreme Court for discussion and the doctrine there laid down has remained unquestioned to the present day. This case, like *Cherokee Nation v. Georgia*, grew out of the attempt of Georgia to exercise jurisdiction over Indian territories situated within the State's limits.

After an historical review of the dealings of England and her American colonies, and the dealings of the United States under the Constitution with the Indians, Marshall said: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. . . . [The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. . . . The Indian nations had always been considered as distinct, independent

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<sup>7</sup> Justices Johnson and Baldwin delivered opinions concurring with that of Marshall. Justice Thompson dissented, holding the Cherokee Nation to constitute not only a sovereign State—though under the protection of the United States—but a foreign State. He said: "They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence and the rights of self-government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves, the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usage and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, without their free consent; or unless a just and necessary war should sanction their dispossession. In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character, and in that sense must the term foreign be understood as used in the Constitution."

<sup>8</sup> 6 Pet. 515.



political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation' so generally applied to them, means, 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same manner."

"Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possess a full right to the lands they occupied until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that within their boundary, they possessed rights with which no State could interfere, and that the whole power of regulating the intercourse with them was vested in the United States. . . . The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity."<sup>9</sup>

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<sup>9</sup> In the Dred Scott case, Taney described the political status of the Indians as follows: "It is true," he said, "that they formed no part of the local communities and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territory to which the white race claimed the ultimate right of



In the Cherokee cases the constitutional authority of the United States to deal with the Indians had been found in the commerce and treaty-making powers.

In *United States v. Kagama*,<sup>10</sup> the court found an additional source of authority in the practical necessity of protecting the Indians, and in the non-existence of a constitutional power of the States to do so. Thus, in this case, with reference to certain criminal laws made by Congress and applied to the Indians, the court declared that the tribes "owe no allegiance to the States and receive from them no protection. Because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen.

. . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary for their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It must be confessed that this argument was not a cogent one and involved a dangerous implication, namely, that a Federal power can be deduced from a practical need for its exercise.

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dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupillage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."

<sup>10</sup> 118 U. S. 375.

The power of the Federal Government over the tribal Indians has carried with it, as we have seen in the *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* cases, an implied prohibition upon the State to exercise authority over them.

In the *Kansas Indians*,<sup>11</sup> decided in 1867, the court, denying to a State the constitutional power to tax the property of Indians not incorporated into its citizen body, said: "If the tribal organization of the Shawnees [the Indians in question] is preserved intact, and recognized by the political department of the Government as existing they are a people distinct from the others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the Government of the Union. If under the control of Congress from necessity there can be no divided authority." The doctrine in this case was affirmed by the court at the same term in the case of the *New York Indians*.

It has been held, however, that the State courts have jurisdiction over offences committed by Indians off the reservation and within the State's territorial limits.<sup>12</sup>

#### § 224. Citizenship of Indians.

From the earliest times the Indians, though treated as subject to the sovereignty first of the foreign colonizing powers, then of the colonies or States, and, finally, of the United States, have been considered not as citizens or subjects, that is, as members of the various bodies politic within whose midst they have lived, but, from the constitutional point of view, as aliens, and their tribes as foreign nations to be dealt with as such, namely, by treaties and agreements rather than by statutes. As alien nations, their members have not, in default of express provisions to the contrary, been held subject to the general laws of the States in which they have resided or to the statutes of the General Government. The relations of Indians to one another have been held to be a matter for the several tribal authorities to regulate, and when these tribal authorities have been impotent, the Indians have lived practically without law.

At the same time, however, that these Indians have thus enjoyed tribal autonomy, and their relations to the States and the Federal Government regulated by treaties and agreements rather than by statute, and their tribes spoken of as foreign nations, there has never been any question but that, in reality, the sovereignty over them after the Revolution and prior to 1789 was in the individual States, and since that time in the United States. From the point of view of general international relations the Indians have always been subjects of the American States or the United States, and, consequently, foreign States have never been conceded

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<sup>11</sup> 5 Wall. 737.

<sup>12</sup> *People v. Antonio* (27 Cal. 404); *Hunt v. State* (4 Kan. 60).

to have a right to deal directly with them.<sup>13</sup> Furthermore, from the point of view of American constitutional law, such attributes of independence and sovereignty as they have enjoyed have been derived by concession from the States, or, since 1789, from the Federal Government. Hence these rights have been at all times subject to withdrawal without the Indians' consent. This was conspicuously shown by the act of Congress of 1871. This law, for the enactment of which the consent of the Indians was neither sought nor obtained, declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."<sup>14</sup>

Since this act of 1871 the legal supremacy of the United States has been further shown by a number of legislative acts, some of them extending the authority of Federal laws and the jurisdiction of the Federal courts over acts previously subject exclusively to the authority of the tribes; others providing for the apportionment in severalty of the tribal lands and the naturalization of Indians without their request or consent.

Certain treaties with the Indians provided that, upon complying with certain formalities somewhat resembling those required of aliens desiring to be naturalized, Indians might become citizens of the United States within the strict constitutional sense of the word.<sup>15</sup>

In 1884, in the case of *Elk v. Wilkins*,<sup>16</sup> the question arose whether an Indian, born a member of one of the Indian tribes within the United States, became a citizen of the United States under the Fourteenth Amendment, by reason of his birth within the United States, and his having voluntarily separated himself from his tribe and taken up a residence among white citizens. In declaring that he did not and could not thus become a citizen, the court said: "The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . . Indians born within the territorial limits of the United States, members of, and owing

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<sup>13</sup> Special passports were issued to Indians desiring to visit foreign countries. See *Moore's Digest of International Law*, Vol. III, p. 878.

<sup>14</sup> Rev. Stat., Sec. 2079.

<sup>15</sup> See, for example, Articles 13, 17, 28 of the treaty of February 23, 1867 (15 Stat. at L. 513).

<sup>16</sup> 112 U. S. 94.

immediate allegiance to one of the Indian tribes (an alien, though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children, born within the United States, of ambassadors or other public ministers of foreign nations. . . . Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being naturalized in the United States by or under some treaty or statute."<sup>17</sup>

#### § 225. Disappearance of Indian Tribal Autonomy.

Since the decision of the Supreme Court in *Elk v. Wilkins* a number of acts of Congress have been passed which have had the effect of destroying, to a very considerable extent, the autonomous tribal governments of the Indians and of subjecting them to the immediate legislative control of Congress instead of to the treaty-making power. The way had been opened to this change in a "rider" attached to an appropriation bill in 1871 which provided, as has been earlier stated, that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."<sup>18</sup>

By an act passed March 3, 1885, the Federal courts were for the first time given considerable jurisdiction over crimes committed within the reservations by Indians upon Indians. Section 9 of this law provides: "That immediately upon and after the date of the passing of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes: namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian Reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes respectively; and

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<sup>17</sup> Justices Wood and Harlan dissented.

<sup>18</sup> Notwithstanding this act, Congress has continued to deal with the Indians, in many cases, by agreements. That is, their formal consent has been required as a condition precedent to putting into force the legislation proposed. Some question as to the constitutionality of this has been raised, it being alleged that the practice amounts to a delegation by Congress of its legislative power in the premises. It would seem, however, that the objection is not of great weight, as it is conceded that a legislative body may make a statute conditional upon the consent of those to whom it applies, provided such assent affects merely the expediency of the statute (*Cooley, Const. Lim.*, 7th ed., p. 164).

said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The constitutionality of this act was attacked upon the ground that it was not within the legislative power of Congress thus to interfere with the internal legal affairs of Indians still maintaining tribal governments. The Supreme Court held, however, in *United States v. Kagama*,<sup>19</sup> that whatever political and legal freedom was enjoyed by the Indians was by way of permission or cession from the Federal Government, and was, therefore, subject to curtailment or complete withdrawal by that power. "These Indian tribes," it declared, "are the wards of the Nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection."

To this decision the objection was urged, and, it would seem, with considerable force, that since the Indians are no longer permitted to enjoy tribal autonomy, and are no longer treated by the Federal Government as independent communities which are to be dealt with by treaties instead of statutes, there disappears the constitutional justification for denying to the States the control of such of them as live within their territorial limits. To this the Supreme Court had no better answer to give than that of expediency—always a poor, if not an absolutely invalid argument. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers," it said, "is necessary to their protection, as well as to the safety of those among whom they dwell." Upon this argument the exclusive jurisdiction of the Federal Government over the negroes could, in a degree at least, be justified.

At various times during past years, Congress has declared, as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. By the General Land in Severalty Law, known as the "Dawes Act," approved February 8, 1887, the President was given the power to apply this process to practically every Indian reservation in the country. The peculiarity of these acts is, it will be observed, that they

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<sup>19</sup> 118 U. S. 375.

make citizens of Indians against their will. The action is to be taken at the discretion of the President and citizenship is to be the result.<sup>20</sup>

<sup>20</sup> The following were the provisions of this act upon the points under discussion:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indians located thereon in quantities as follows: . . .

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. . . .

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory, in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. . . .

"Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miannies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." (Rev. Stat., § 2316.)

The "Dawes" Act of 1887 also provides for allotments of land and citizenship to Indians who may wish to settle upon the public lands of the United States. It also declares that all Indians forsaking their tribal life and adopting the habits of civilized life shall become citizens. Without this express statutory provision, as was decided in *Elk v. Wilkins*, citizenship could not thus be obtained.

The peculiar status of those Indians who have not become citizens is illustrated in the form of a letter of protection issued in lieu of a passport, to those traveling abroad. The following is a letter issued by our consul at Odessa, the form of which has been approved by the State Department:

The declaration of 1871, and later acts of Congress, and the sustaining of their constitutionality by the Supreme Court, illustrate the power of the United States to govern the tribal Indians as bodies of individuals completely subject to its legal control, despite the status of *quasi*-independence that has been accorded them. This absolute power of control has been conspicuously exhibited in more recent legislation which has been enacted in pursuance of a policy decided upon to abolish, as rapidly as possible, the tribal relations and governments, to extinguish the Indian titles to lands, and to incorporate the individual Indians in the general citizen bodies of the States and Territories in which they live.

This new policy was based upon the facts found by the "Dawes Commission" which was created by the acts of March 3, 1893<sup>21</sup> and March 2, 1895.<sup>22</sup>

By the act of June 2, 1924,<sup>23</sup> it was comprehensively declared: "That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

The constitutionality of dealing with the Indians by statute has been questioned in a number of cases before the Supreme Court, but has always been sustained.

In *Stephens v. Cherokee Nation*,<sup>24</sup> decided in 1899, it was held that because such legislation might be in violation of previous treaties with the Cherokees was no ground for holding it invalid.<sup>25</sup> As to the general legislative powers of Congress over the Indians, the court said: "We need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation v. Southern Kan. Ry. Co.* (135 U. S. 641), from whose opinion we quote as follows: 'The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its

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"To whom it may concern:

"The bearer of this document is a North American Indian whose name is Hampa. This Indian is a ward of the United States, and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia, and to grant him permission to depart when he requires it."

<sup>21</sup> 27 Stat. at L. 209.

<sup>22</sup> 28 Stat. at L. 189.

<sup>23</sup> 43 Stat. at L. 253. The act was entitled, "An Act to authorize the Secretary of the Interior to issue certificates of citizenship to Indians."

<sup>24</sup> 174 U. S. 445.

<sup>25</sup> Quoting *Thomas v. Gay* (169 U. S. 284).



limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States.' . . . It is true, as declared in *Worcester v. Georgia* (6 Pet. 515) that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583), that 'in the executive, legislative, and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people and as being vested with rights which constitute them a State, or a separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory."

In *Cherokee Nation v. Hitchcock*,<sup>26</sup> decided in 1902, the provisions of the act of 1898, authorizing the Secretary of the Interior to prescribe regulations for the leasing of mineral lands in the tribal districts of the plaintiffs for the purpose of making these lands productive and of securing therefrom an income for the benefit of the tribe, was held valid.

In *Lone Wolf v. Hitchcock*,<sup>27</sup> decided in 1903, was questioned the constitutionality of an act of Congress of 1900 providing for allotment in severalty of lands held in common within certain Indian reservations and purporting to give an adequate consideration for the surplus lands not allotted or reserved for their benefit. In its opinion, upholding the validity of the act, notwithstanding its alleged incongruity with previous treaties, the court said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, and not subject to be controlled by the judicial department of the government. . . . The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."

In *United States v. Rickert*,<sup>28</sup> decided in 1903, it was held that lands allotted in severalty to Indians under the act of 1887, and held in trust for them by the United States for twenty-five years, are not taxable by the State in which situated, nor are the improvements upon them, or the cattle or other property furnished the allottees by the United States. The court in its opinion said: "To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that 'from their very weakness and help-

<sup>26</sup> 187 U. S. 294.

<sup>27</sup> 187 U. S. 553.

<sup>28</sup> 188 U. S. 432.



lessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.' *United States v. Kagama*, 118 U. S. 375."

With reference to the permanent improvements on the lands in question, the court said: "Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements. It is true that the statutes of South Dakota, for the purpose of taxation, classify 'all improvements made by persons upon lands held by them under the laws of the United States,' as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States."

With reference to the personal property provided the allottees, the court declared: "The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and in the permanent improvements thereon. The personal property in question was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

Finally, with reference to the question whether the United States had a sufficient interest in the matter to entitle it to bring suit, the opinion declared: "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under National control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary."

In *Re Hoff*,<sup>29</sup> decided in 1905, however, the court held that an Indian to whom an allotment under the act of 1887 had been made, and who, by that act, had been granted the privilege of citizenship, and given the benefit of, and subjected to, the civil and criminal laws of the State in which he resided, was a member of the citizen body of that State, and no longer under such Federal control as to empower Congress, under the commerce clause, to penalize the sale within the State of liquor to him.<sup>30</sup>

Additional acts of Congress in this history of its purpose to assimilate the tribal Indians into the general citizen body of the nation are two statutes enacted in 1906.

By an act approved April 26, 1906, provision is made for the final

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<sup>29</sup> 197 U. S. 488.

<sup>30</sup> After a review of the recent legislation of Congress dealing with the Indian, and a consideration of the police powers reserved to the States, the court said: "But it contended that, although the United States may not punish under the police power the sale of liquor within a State by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of § 8, Art. I, of the Constitution which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress, having power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State, and shall be a citizen of the United States, and therefore a citizen of the State. But the logic of this argument implies that the United States can never release itself from the obligations of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the General Government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound. But it is said that the government has provided that the Indian's title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property; but these are mere property rights, and do not affect the civil or political status of the allottees. . . . But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. . . . But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the State, it places him outside of police regulations on the part of Congress; that the emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

disposition of the affairs of the Five Civilized Tribes in the Indian Territory. In this statute rules were laid down for determining tribal membership; the removal of chiefs for non-performance of duties prescribed by the act; the transfer of tribal schools to the control of the Secretary of Interior; for the collection of tribal revenues by officers appointed by the Secretary; the abolishment of tribal taxes; the disposition of tribal buildings and other property; the sale of unallotted lands; the *per capita* distribution of tribal funds; the prohibition for a period of twenty-five years of the sale or encumbering by Indians of lands allotted to them (though leases might be entered into, except homesteads, with the approval of the Secretary of the Interior); that all lands, thus restricted, should be exempt from taxation as long as the title remains in the original allottee.<sup>31</sup>

By an act approved May 8, 1906, section 6 of the act of 1887 was amended so as to read as follows: "Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen

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<sup>31</sup> Sections 27 and 28 provided as follows:

"Sec. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: Provided, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

"Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subjected to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory." <sup>32</sup>

The Enabling Act of June 6, 1906, providing for the admission of the Territories of Oklahoma and Indian Territory as the State of Oklahoma, provided: "That nothing contained in the said Constitution [of Oklahoma] shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

#### § 226. Commerce with the Indians.

The only direct references to the Indians in the Constitution are in the provisions that "Indians not taxed" shall not be counted in determining the number of representatives in Congress to which a State is to be entitled,<sup>33</sup> and that Congress shall have power "to regulate commerce . . . with the Indian tribes."<sup>34</sup>

The powers conferred upon the General Government by the Commerce Clause will be discussed in another chapter. It may here be observed, however, that the Federal authority over commerce with the Indians is much broader than that over commerce between the States. As Prentice and Egan observe: "The purpose with which this power [commerce with the Indians] was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger

<sup>32</sup> 34 Stat. at L. 182.

<sup>33</sup> Art. I, Sec. 3.

<sup>34</sup> Art. I, Sec. 8, Cl. 3.

of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce." <sup>35</sup>

"Commerce with foreign nations and among several States is that commerce which involves transportation across State lines, and is put within Federal control to avoid discriminating, conflicting, and burdensome State legislation. Commerce with the Indian tribes frequently involves no such transportation. It may be carried on wholly within the limits of a single State. . . . In this case . . . the power of Congress is not determined by the locality of the traffic, but extends wherever intercourse with Indian tribes, or with any member of an Indian tribe, is found, although it may originate and end within the limits of a single State. The jurisdiction is, therefore, personal rather than economic in its nature." <sup>36</sup>

In *United States v. Holliday*<sup>37</sup> the court held that Congress had the power to forbid the sale of liquor to an Indian in charge of an agent, in a State and outside of an Indian reservation. The opinion declared: "The locality of the traffic [with Indians] can have nothing to do with this power. The right to exercise it with reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on."

And in *United States v. 43 Gallons of Whiskey* <sup>38</sup> was upheld the power of Congress to exclude spirituous liquors not only from existing Indian country but from that which had ceased to be so by reason of its cession to the United States, but was adjacent to the Indian settlements. The same regulation, the court declared, could be provided by the treaty-making power.

#### § 227. Indian Lands.

With reference to the title possessed by Indians in the lands occupied or hunted over by them, the principle was from the first applied by the white settlers that by discovery and occupation the title in fee to all the lands thus taken possession of became vested in the sovereign of the State under whose authority the conquest was made.<sup>39</sup>

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<sup>35</sup> *The Commerce Clause of the Federal Constitution*, p. 342.

<sup>36</sup> Prentice & Egan, *op. cit.*, p. 346.

<sup>37</sup> 3 Wall. 407; 18 L. ed. 182.

<sup>38</sup> 93 U. S. 188; 23 L. ed. 846.

<sup>39</sup> In earlier years the attempt was made to establish in international law the principle that mere discovery of unoccupied land, or land inhabited by uncivilized tribes, is sufficient to give title to the sovereign by whose subjects the discovery was made. This principle, however, never obtained general recognition, and the present doctrine

This principle that the original title to all the land within a State is in the sovereign of that State, and that by grant from him all individual titles are obtained, was the feudal one which the crown lawyers of England had developed; and, after the separation from that country, the American Commonwealths continued to apply the doctrine, substituting, however, of course, the respective States for the English Crown. With the formation of the present Union, and the transfer to it by the several States of their respective claims to public lands, the United States was substituted as the owner of all lands to which private titles had not been obtained. This grant to the Federal Government carried with it whatever interest or title the several States had had in the Indian lands.

The first discussion in the Supreme Court of the United States of the title or interest still retained by the Indians in the lands occupied by them, was in the case of *Fletcher v. Peck*.<sup>40</sup> This case involved the question whether the State of Georgia had been seized in fee of certain lands which it had sold, but later resumed possession of. Marshall in his opinion, without attempting any argument, said: "It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State."<sup>41</sup>

In *Johnson v. M'Intosh*<sup>42</sup> the question of titles to Indian lands was was established that in order to give a national title which other States are bound to respect, discovery must be followed, within a reasonable time, by effective occupation.

<sup>40</sup> 6 Cr. 87.

<sup>41</sup> Justice Johnson dissented from this doctrine, holding that the fee was in the Indians, and that the interest of the United States consisted in a right of preemption. He said: "What, then, practically, is the interest of the States in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain definite limits. All restrictions upon the right of soil in the Indians amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest of Georgia was nothing more than a pre-emptive right, how could that be called a fee simple, which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be pleased to sell? And if this was anything more than a mere possibility, it certainly was reduced to that state when the State of Georgia ceded to the United States, by the Constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States."

<sup>42</sup> 8 Wh. 543. The full opinion in this case should be read for an elaborate discussion of the principles governing the treatment by colonizing nations of the rights of indigenous uncivilized peoples.

thoroughly examined and a conclusion reached which was substantially the same as that boldly stated without argument by Marshall in the *Fletcher v. Peck* case. In substance it was held that although the fee to Indian lands is in the United States, and, therefore, that the Indians are not able to grant titles to the same which will be recognized in the courts of the United States, nevertheless these Indians have certain possessory rights from which they may be dispossessed by the United States only with their consent, and upon compensation therefor.

The doctrines thus laid down in 1823 by Marshall in *Johnson v. M'Intosh* have never been changed, and the practice of the United States government uniformly throughout its history has been in accordance with it. That is to say, where Indians have been dispossessed of their lands, their consent, in form at least, has been obtained, and compensation made either in the form of money or other lands. Where tribal relations have been maintained these possessory rights have been held to be vested in the tribes respectively, and not severally in the individual Indians. From time to time, however, as will be seen, the United States Government has provided for the dividing up of these tribal lands and the apportioning of them in severalty among the individual Indians.

#### § 228. Property and Other Private Rights of Indians.

The individual Indian, a member of a tribe, has no legally enforceable right in the tribal property. However, as has been seen, he has been recognized to have an equitable interest in the tribal lands, which right Congress has sought to satisfy in its legislation with reference to them. And it is established that when definite rights have been conferred upon individual Indians they may not be arbitrarily abrogated by congressional statute. As the court says in *Choate v. Trapp*,<sup>43</sup> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States."<sup>44</sup> His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones v. Meehan*.<sup>45</sup> . . . Nothing that was said in *Tiger v. Western Investment Co.*<sup>46</sup> is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power

<sup>43</sup> 224 U. S. 665.

<sup>44</sup> Citing: *Re Heff* (197 U. S. 504); *Cherokee Nation v. Hitchcock* (187 U. S. 307); *Jackson v. Goodell* (20 Johns. 188), and other cases.

<sup>45</sup> 175 U. S. 1.

<sup>46</sup> 221 U. S. 286.



of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land, or any right, member, or appurtenance thereunto belonging. It left that as it was."

In the instant case it was held that certain Indian allottees under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of land which were to be non-taxable for a specified period, acquired vested rights of exemption from State taxation which were protected by the Fifth Amendment against abrogation by Congress.

That the granting of citizenship to Indians does not prevent Congress from continuing to deal with their tribal lands, as to their alienation, etc., is established.<sup>47</sup>

It is equally established that the United States still retains jurisdiction over Indians for offences committed within Indian reservations, even though they have been given citizenship of the United States and of the State in which their reservations are situated. In *United States v. Celestine*<sup>48</sup> the cases upon this point were fully reviewed by Mr. Justice Brewer, who, in the course of his opinion, said:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may be fairly held that the statute does not contemplate a surrender of jurisdiction over an offence committed by one Indian upon the person of another Indian within the limits of the reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."

This doctrine was affirmed in *Tiger v. Western Investment Co.*<sup>49</sup> and *Hallowell v. United States*<sup>50</sup> decided at the same time. In *Heckman v. United States*<sup>51</sup> the question was carefully examined and affirmatively

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<sup>47</sup> In *Cherokee Nation v. Hitchcock* (187 U. S. 294), the court said: "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the Act of 1898 (30 Stat. at L. 495) has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation." See also *United States v. Sandoval* (231 U. S. 28); *Bowling v. United States* (233 U. S. 528); *Brader v. James* (246 U. S. 88); *Winton v. Amos* (255 U. S. 373); *Tiger v. Western Investment Co.* (221 U. S. 286); *United States v. Reckert* (188 U. S. 432); *Beck v. Flournoy Live Stock, etc., Co.* (12 C. C. A. 497); *Rainbow v. Young* (88 C. C. A. 653).

<sup>48</sup> 215 U. S. 278.

<sup>49</sup> 221 U. S. 286.

<sup>50</sup> 221 U. S. 317.

<sup>51</sup> 224 U. S. 413.



answered as to the right of the United States to sue in its own courts to enforce restrictions placed by Congress upon the right of Indians to alienate lands allotted to them. The court said: "During the continuance of this guardianship [of the Indians], the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. . . . This national interest is not to be expressed in terms of property or to be limited to the assertion of rights incident to the ownership of a reservation or to the holding of a technical title in trust." <sup>52</sup>

Upon the authority of *United States v. Holliday*,<sup>53</sup> *United States v. Lariviere*,<sup>54</sup> and *Deck v. United States*,<sup>55</sup> the court, in *Perrin v. United States* <sup>56</sup> held that Congress had the power to prohibit the sale of intoxicants upon Indian lands that had been ceded to the United States and which had been opened to disposition under homestead and townsite laws and had largely passed into private ownership, if, in the judgment of Congress, such prohibition was reasonably essential to the protection of the Indians residing on the unceded lands.

#### § 229. Indian Tribes: Determination of Existence of.

As to whether a group of Indians is to be regarded and controlled as a tribe, the courts are guided by the determination of the political departments of the government. In *United States v. Holliday* <sup>57</sup> the court said: "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other departments of the government, whose more special duty it is to determine such affairs." However, in *United States v. Sandoval*,<sup>58</sup> the court somewhat qualified this rule by saying: "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities this question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring guardianship and protection by the United States are to be determined by Congress, and not by the Courts."

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<sup>52</sup> See also *Bowling v. United States* (233 U. S. 528).

<sup>53</sup> 3 Wall. 419.

<sup>54</sup> 93 U. S. 198 and 108 U. S. 491.

<sup>55</sup> 208 U. S. 340.

<sup>56</sup> 232 U. S. 478.

<sup>57</sup> 3 Wall. 407.

<sup>58</sup> 231 U. S. 28.

## CHAPTER XXII

### THE ADMISSION OF NEW STATES

#### § 230. The Admission of New States.

The process of admitting new States to the American Union is a comparatively simple process and but few constitutional questions have arisen in connection with it. The constitutional clause governing the subject reads as follows: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress."<sup>1</sup> It will thus be seen that nothing is said as to the conditions that must be met by a given territory before it may claim, or Congress be obligated to grant, admission to the Union as a State. The whole matter is left absolutely to the discretion of Congress. There can be no question but that at the time of the adoption of the Constitution the idea was generally held that all non-state territory held or to be held by the United States was to be regarded as material from which new States were to be created as soon as population and material development should warrant. But no attempt was made to force the hand of Congress under circumstances that could not be foreseen by defining in the Constitution itself the conditions under which statehood should be accorded. But one limitation is laid down, and that impliedly, and this relates rather to the status of new States after admission, than to the process of admission itself. This is that the new Commonwealths, when received into constitutional fellowship with the older members of the Union, shall stand upon an exactly equal footing with them.

As has been seen, the Constitution does not attempt to fix the *modus operandi* in which new members are to be admitted into the Union. It does not even say whether they are to be formed from territory already under its sovereignty, and, in one instance, that of Texas, a new State was received by the direct process of incorporating, by a joint resolution of Congress, a foreign independent State. In all other cases, however, new States have been formed from areas already belonging to the United States and organized as territories.

The usual process by which these Territories have obtained statehood is

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<sup>1</sup> Art. IV, Sec. 3.

as follows: The people of a territory petition Congress to grant them statehood. If that body is favorably disposed, a so-called "enabling act" is passed, authorizing the framing of a State Constitution, prescribing the manner in which it shall be framed, and laying down certain requirements that must be met. All these conditions having been met, a resolution reciting this fact is passed by Congress, and the Territory declared a State and admitted as such into the Union. In some cases the final step in the process has been a proclamation issued by the President in obedience to the direction of Congress.

The above has been the usual and regular process. In not a few instances, however, the inhabitants of Territories have met in conventions and framed Constitutions without first obtaining the authorization of Congress. The acceptance, however, by that body, of the instrument framed has been considered sufficient to validate the proceeding.

There has been some little constitutional speculation as to whether the decisive, creative act in the bringing into existence of a new State is the resolution of Congress approving the constitution that has been drawn up and declaring the former Territory one of the States of the Union; or whether the vivifying force is derived from the constituent act of the people of the Territory in framing and adopting their State Constitution. The latter is the view most acceptable to the States' Rights school.<sup>2</sup> It would seem to be sufficiently plain, however, that the former is the correct doctrine; for there can be no question but that it lies within the power of Congress arbitrarily to refuse its approval to a constitution that has been framed by the people of a Territory strictly in accordance with the requirements of the Enabling Act. The final, and therefore decisive step, has thus to be taken by the Federal Government.

This doctrine has, indeed, received implied judicial sanction at the hands of the United States Supreme Court in its decision in the case of *Scott v. Jones*.<sup>3</sup>

In this case was involved the validity of an act of a legislature of a Territory passed prior to the admission of the Territory into the Union as a State. The Supreme Court dismissed the case for lack of jurisdiction on the grounds that the law in question was not passed by a legislature of a State and did not, therefore, come within the express terms of the Judiciary Act, which provided the court with its appellate juris-

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<sup>2</sup> In Brownson's *American Republic*, premising that the entrance of Territories into the Union as States is the free act of the peoples of the respective Territories, the argument is made that the States of the Southern Confederacy, by their ordinances of secession, in effect annulled these acts, and thus, *ipso facto*, relegated themselves to the status of Territories, and as such came under the complete control of Congress for that body to "reconstruct" their governments as it should see fit, and readmit them as States, and upon such terms, as it should approve.

<sup>3</sup> 5 How. 343. Cf. Jameson, *Constitutional Convention*, Sec. 207.

diction. Referring to the fact that the jurisdiction conferred by the twenty-fifth section of the Judiciary Act had been granted lest a State might legislate against some part of the Constitution, or trench upon matters not within its province, the court said: "Such being the evil or danger, it precludes the idea that this clause in the Judiciary Act had any reference to the fact that public bodies which had not been duly organized, and not been admitted into the Union, would, as States, undertake to pass laws, without being empowered to do it, which might encroach on the Union or its granted powers, and hence should be thus guarded against. Such conduct by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of any of the departments of this government, unless so interfering with its rights as to call for the political exercise of the executive and legislative authority over our foreign relations. Again, such conduct by bodies situated within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies unlawfully organized are situated and acting. While in that condition their measures are not examinable at all by a writ of error to this court, as not being statutes by a State, or a member of the Union. And after such bodies are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunals of the General Government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State, within the meaning and spirit of the Judiciary Act. And if so, we must inquire only into the validity of their subject-matter, and not as to the new, any more than the old, States, ever suppose that the question of their political competency or power to pass statutes at all was an inquiry intended to be placed under our consideration and decision by the twenty-fifth section of the Judiciary Act. It follows, then, that a statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of Sec. 25 of the Judiciary Act, unless re-enacted or adopted after becoming a State; then it is treated like the statute of any State; or the admission of the State into the Union by Congress, subsequently with the constitutional and political organization under which the statute was passed by the State—a competent State—leaving, as in other cases, merely its subject-matter to be examined in order to see if it violates or not any acts or provisions of the General Government."

The question has never arisen for answer whether the United States can impose statehood upon a Territory whose inhabitants have not asked for it. There would, however, seem to be no constitutional difficulty in this being

done. Just as citizenship may be imposed upon an individual without his consent, so, it would seem, may the status of a full member of the Union be imposed upon a Territory.

The continuing force of the conditions imposed by Congress upon States at the time of their admission into the Union has been earlier discussed.<sup>4</sup>

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<sup>4</sup> *Ante*, Chapter XVI.

## CHAPTER XXIII

### THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

In the chapters that have gone before the effort has been made to set forth the constitutional relations subsisting between the Union and its commonwealth members. From the very beginning, however, the American constitutional system has included other political units than the States. These units are Territories, Dependencies, and a Federal District or seat of National Government.<sup>1</sup> To a consideration of the constitutional questions incident to the annexation and government by the National Government of the Territories and peoples of which these political elements are composed, we shall now turn. This will involve a discussion of the following points: (1) The constitutional power of the United States to acquire territories; (2) the modes or purposes for which they may be acquired; and (3) their constitutional status. First then as to the power to acquire.<sup>2</sup>

No express power is given to the United States by the Constitution to acquire additional territory. In 1803, however, the vast Louisiana Territory was purchased from France and annexed to the Union; in 1819 Florida was obtained from Spain; in 1846 the Oregon Territory was obtained through discovery, occupation, and convention with England; in 1845 the State of Texas was annexed; in 1848 and 1853 additional territory was obtained by cession from Mexico; in 1856 the annexation of the Guano Islands was authorized by a congressional statute; in 1867, Alaska, the first territory non-contiguous to the United States, was obtained from Russia; in the same year Midway Island was taken possession of by the President; in 1898 the Hawaiian Islands were annexed; in 1898, as a result of the Spanish-American War, the islands of Porto Rico, the Philippines, and Guam came under the sovereignty of the United States; and in 1900, three of the Samoan islands were acquired.<sup>3</sup>

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<sup>1</sup> The term "Dependency" can hardly be said to have been as yet accepted as a technically correct term, and possibly never may be. In default, however, of a better word the term will be here provisionally employed.

<sup>2</sup> In this chapter there is considered simply the question as to the power of the United States to extend its sovereignty over additional territory. The question whether territory when thus brought under the dominion of the United States is necessarily "incorporated" in it, in a peculiar constitutional sense, is discussed in a later chapter (Chapter XXIX).

<sup>3</sup> The term "Insular Possessions" has been officially applied to the islands owned by the United States.

The constitutional power of the United States thus to annex foreign territory has been, at various times, and by various writers, derived from the following sources:

1. The power to admit new States into the Union.<sup>4</sup>
2. The power to declare and carry on war.<sup>5</sup>
3. The power to make treaties.<sup>6</sup>
4. The power, as a Sovereign State, to acquire territory by discovery and occupation or by any other methods recognized as proper by international usage.

These various sources will be considered seriatim.

**§ 231. The Right to Annex Based on the Right to Admit New States.**

At the time of the adoption of the Constitution, the territory subject to the sovereignty of the United States consisted of the respective territories of the thirteen original States, and the vast reaches of land to the west,—that to the north and west of the Ohio river being known as the Northwest Territory. These areas had been ceded to the old Confederation of the States and governed according to the provisions of the famous Northwest Ordinance of 1787; which provisions were reenacted upon the establishment of the new government in 1789.<sup>7</sup>

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<sup>4</sup> Art. IV, Sec. 3, Cl. 1.

<sup>5</sup> Art. I, Sec. 8, Cl. 11.

<sup>6</sup> Art. II, Sec. 2, Cl. 2.

<sup>7</sup> To this government Georgia and North Carolina later ceded their western lands. The act of August 7, 1789, was as follows:

*"An Act to Provide for the Government of the Territory Northwest of the River Ohio:*

"Whereas, in order that the ordinance of the United States in Congress assembled for the government of the territory northwest of the River Ohio may continue to have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States.

"Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in which by the said ordinance any information is to be given or communication made by the Governor of said Territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of said Governor to give such information and to make such communication to the President of the United States, and the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers which by said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him, and in all cases where the United States in Congress assembled might by the said ordinance revoke any commission or remove from any office, the President is hereby declared to have the same power of revocation and removal.

"Section 2. And it is further enacted, That in case of the death, removal, resignation or necessary absence of the Governor of said Territory, the secretary thereof shall be and is hereby authorized and required to execute all the powers and perform all the duties of the Governor during the vacancy occasioned by the removal, resignation or necessary absence of said Governor."

It is not necessary in this place to trace the history of the part played during the period preceding 1787 by the conflicting claims of the colonies or States to the "back lands," and how Maryland refused to sign the Articles of Confederation until all the States should surrender these lands to the Congress for the joint benefit of all the people of the States to be in proper time "parcelled out by Congress into free convenient and independent States and Governments," and how, finally, this was substantially done.

That the Congress of the Confederation had no constitutional power to accept these cessions of territory is sufficiently plain,<sup>8</sup> but this was not questioned at the time, and in 1787 the ordinance for the government of the Northwest Territories was enacted. The Articles of Confederation did, however, provide for the admission of new States, Article XI declaring that, "Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of the Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States."

In the Convention which framed the present Constitution the Virginia resolutions declared "that provision ought to be made for the admission of States lawfully arising within the limits of the United States whether from a voluntary juncture of government, transitory or otherwise, with the consent of a number of voices in the national legislature less than the whole." This was agreed to without debate in the committee of the whole. As reported by the Committee of Detail, the draft of the Constitution provided<sup>9</sup> that "new States lawfully constituted or established within the limits of the United States may be admitted, by the legislature into the government; but to such admission the consent of two-thirds of the members present in each House shall be necessary."

In the Convention, in order to cover certain conditions then existing, especially the status of Vermont, this clause, after repeated amendments, was finally made to read: "New States may be admitted by the legislature into the Union; but no new States shall be hereafter founded or erected within the jurisdiction of any of the present States, without the consent of the legislature of such State as well as of the general legislature."

As finally phrased by the Committee on Style and adopted by the Convention the clause reads: "New States may be admitted by the Congress into this Union; but no new State shall be founded or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

During this course of evolution it will be seen that the limitation "within

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<sup>8</sup> Cf. Taney in *Scott v. Sandford* (19 How. 393).

<sup>9</sup> Art. XVII.



the limits of the United States" disappeared. It does not, however, appear from the debates just why these words of limitation were omitted. From some expressions of opinion of the time, there is, nevertheless, evidence that the possibility and desirability of an expansion of the United States beyond the limits fixed by the treaty of 1783, was early recognized by men active in the framing and adoption of our present Constitution.

Alexander Hamilton, in a letter to Washington, wrote: "We must remain in a position to take advantage of circumstances, we must be prepared to acquire Florida, and to annex Louisiana and we must even wink further South."

And Gouverneur Morris, the author of that clause of the Constitution which confers upon Congress the power to make rules and regulations respecting territory and other property of the United States, writing in 1803 to Livingston said: "I am very certain that I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. Without examining whether a limitation of territory be or be not essential to the preservation of republican government, I am certain that the country between the Mississippi and the Atlantic exceeds by far the limits which prudence would assign, if in effect any limitation be required. Another reason of equal weight must have prevented me from thinking of such a clause. I knew as well then as I do now that all North America must at length be annexed to us. Happy, indeed, if the lust of dominion stop there." Writing again to Livingston, however, Morris said that while he held that the United States might acquire additional territory, it could not create new States of the Union out of it. He said: "I perceive I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made."<sup>10</sup>

#### § 232. Annexation of Louisiana. Views of Jefferson.

When, in 1790, North Carolina made a cession to the United States of its title to western territory, this was accepted by Congress in the act of April 2, 1790, without constitutional question. This it will be observed, however, involved only a transfer of title from a State to the Nation and not an annexation of territory foreign to the United States. The acquisition of the Louisiana Territory was, however, of this latter char-

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<sup>10</sup> *Life and Writings* (Sparks), III, 185, 192.

acter, and Jefferson, then President, felt, and expressed, as we know, most serious doubts as to the constitutionality of the act, though, upon grounds of political expediency, he urged that the treaty providing for it be ratified, and if necessary, a constitutional amendment giving to the National Government the necessary power be adopted.<sup>11</sup>

Though not perfectly clear upon the point, it would seem that Jefferson drew a distinction between the constitutional power of the United States to extend its sovereignty over additional territory and to "incorporate" it in the United States as a part thereof; and that his constitutional qualms were excited rather by the exercise of the latter power than of the former. In answer to a letter of Gallatin he wrote (January, 1803): "There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now

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<sup>11</sup> Before the ratification of the treaty Jefferson wrote to John Dickinson as follows: "The General Government has no powers but such as the Constitution gives it; and it has not given it power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this. In the meantime we must ratify and pay our money, as we have treated for a thing beyond the Constitution and rely on the nation to sanction an act done for its great good without its previous authority."

To John C. Breckenridge he wrote: "The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, has done an act beyond the Constitution. The Legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is a case of a guardian investing the money of the ward in purchasing an important adjacent territory, and saying to him when of age: 'I did this for your good; I pretend to no right to bind you; you may disavow me and I must get out of the scrape as best I can; I thought it my duty to risk myself for you.' But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution by more strongly marking its lines."

Writing to William C. Nicholson before the ratification of the Louisiana treaty he said: "Whatever Congress shall think best to do should be done with as little debate as possible, and particularly as far as respects the constitutional difficulty. I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new States into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783; that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were acting. I do not believe it was meant that they might receive England, Holland, Ireland, etc., into it, which would be the case in your construction. When an instrument admits of two constructions, one safe and the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather risk enlargement of power from the nation where it is found necessary than to assume it by a construction which makes our powers boundless."

territories . . . shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the Federal Constitution and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States." <sup>18</sup>

In the treaty of 1848 with Mexico whereby Mexico relinquished its rights to Upper California and New Mexico the United States promised that—"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." <sup>49</sup>

In the treaty with Russia for the cession of Alaska the United States agreed that—"The inhabitants of the ceded territory . . . should be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." <sup>20</sup>

In the provisions of all of these several treaties there is thus to be recognized the presence of the idea in the minds of those who framed and ratified them that the territories thus acquired were to be incorporated as integral elements in the United States and ultimately to be erected into States and admitted into the Union in full and equal fellowship with the original States. The consideration which led the ceding nations to have these promises inserted in the treaties of cession was the same which urges all nations in parting with portions of their territories and their inhabitants to provide, as far as possible, that their former citizens thus handed over to the control of a foreign power, shall not be oppressed but be treated on an equality with the other citizens of the annexing State.

Down to the time of the war of 1898 with Spain we find repeated utterances of public men and of the courts that all of the territories of the United States, originally owned and acquired, not already States, were destined for that status.<sup>21</sup> Senator Hoar, indeed, declared in the Senate when the future of the Philippine Islands was being discussed, "I have been unable to find a single reputable authority more than twelve months old, for the power now claimed for Congress to govern dependent nations or territories not expected to become States. The contrary, until this war broke out, has been taken as too clear for reasonable question."

In support of the view that the holding permanently of territory not destined for statehood is foreign to, and not compatible with, our prin-

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<sup>18</sup> 8 Stat. at L. 256.

<sup>19</sup> 9 Stat. at L. 930.

<sup>20</sup> 15 Stat. at L. 542.

<sup>21</sup> Alaska may be treated as an exception. This area, at the time of its annexation, had a very small population and it was not expected that this population would increase.

ciples of government, the declarations of Jefferson, Madison, Monroe, J. Q. Adams, Webster, Calhoun, Clay, Reverdy, Johnson, Berrien, Edward Everett, Seward, and Sumner have been quoted; and, of course, if Senator Hoar's statement be correct, this list might be almost indefinitely extended.

#### § 234. Judicial Dicta. Taney's Views.

A certain number of *dicta* of the Supreme Court of the United States may also be found in which the language indicated an accepted assumption that the territories held by the United States were all ultimately to be erected into States. Thus in *Loughborough v. Blake*,<sup>22</sup> Marshall, after referring to the attempt of Great Britain to tax her American colonies, said: "The difference between requiring a continent with an immense population to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean and associated with it by no common feelings, and permitting the representatives of the American people, under the restrictions of our Constitution, to tax a part of the society, which is in a state of infancy, advancing to manhood, looking forward to complete equality as soon as that state of manhood shall be attained, as is the case with the Territories, is too obvious not to present itself to the minds of all."

Thus also, in *Shively v. Bowlby*,<sup>23</sup> the court said: "The Territories acquired by Congress whether by deed or cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify, of being admitted into the Union as States upon an equal footing with the original States in all respects; and the title and dominion of the tidewaters and the lands under them are held by the United States for the benefit of the whole people, and, as this Court has often said, in trust for the future States. . . . Upon the acquisition of a Territory by the United States, whether by cession from one of the States or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several States to be ultimately created out of the Territory."

Chief Justice Taney has often been cited as holding in his opinion in the *Dred Scott* case that foreign territory might be acquired by the United States only under its power to admit new States. This is not correct. In *Fleming v. Page*,<sup>24</sup> he had already expressly declared that foreign territory might be acquired under the treaty and war-making powers, and in the *Dred Scott* case, approved, upon this point, the decision of

<sup>22</sup> 5 Wh. 317.

<sup>23</sup> 152 U. S. 1; 14 Sup. Ct. Rep. 548; 38 L. ed. 331.

<sup>24</sup> 9 How. 603.

Marshall in *American Insurance Co. v. Canter*.<sup>25</sup> He asserted, however, that these powers are to be exercised only for the purpose of acquiring territories which ultimately may become States, and that, when acquired, they are to be governed with this end in view, namely, of preparing them for this status. It is thus apparent that the constitutional limitation which, in this case, Taney was intent upon emphasizing, was rather one upon the control of Congress over territories that have been annexed, than upon the power of the General Government to acquire them. In his opinion he said: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State and the citizens of the State and the Federal Government. But no power is given to acquire a territory to be held and governed permanently in that character. And, indeed, the power exercised by Congress to acquire territory and establish a government there according to its own unlimited discretion was viewed with great jealousy by the leading statesmen of the day. . . . We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given, and in the construction of this power by all the departments of the Government it has been held to authorize the acquisition of a territory not fit for admission at the time, but to be admitted as soon as its population would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion."

So, likewise, it will be found that the various opinions delivered in this case by the other members of the court, concurring and dissenting, were concerned rather with the limitations of the powers of government of annexed territory, than with the extent of the power to acquire. We shall consider this phase of the question in another chapter.

#### § 235. Conclusions.

Concerning the validity of this claim that the Constitution looks to a Union composed only of States and potential States, this much may

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<sup>25</sup> 1 Pet. 511; 7 L. ed. 242.

be granted: Beyond all reasonable doubt those who framed and adopted the Federal Constitution did not anticipate, and therefore cannot be said deliberately to have provided for, the time when the United States should extend its sovereignty over territories not intended ultimately for statehood. Nor can it be said that a different view was held upon this point by practically any one until comparatively recent times. But in admitting this, the conclusion that the annexation of such territory was an unconstitutional act does not follow. For in the first place, as has been repeatedly declared by the Supreme Court, it is not enough to say that a particular case was not in the minds of those who framed and adopted the Constitution in order to hold an act unconstitutional. One must go further and show that had the particular case been suggested to those framers and adopters of the Constitution, they would have so modified its language as to exclude it.<sup>26</sup> In the second place, even were this principle of constitutional construction not sufficiently broad to uphold the Federal power in question, there would be applicable two principles, each of which would prevent the Supreme Court from passing upon this point. The first of these principles is the one elsewhere mentioned that the question of *de facto* and *de jure* sovereignty is one regarding which the courts hold themselves bound by the determination of the executive and legislative branches of government; the second is that the motive of an act, except for the purpose of solving an ambiguity in its application, is not a proper subject for judicial examination, and that, therefore, in the case of an annexation of territory, it would not be proper for the court to inquire whether or not ultimate statehood was intended to be granted the lands and peoples obtained. Indeed, as we have seen, as regards the contiguous continental territories of the United States, it has been uniformly held that the grant to them of statehood lies wholly within the discretion of Congress, and that no legal means exist for compelling action should that body arbitrarily refuse for an indefinite length of time to grant this privilege to a deserving territory.

The question whether or not territory not contiguous to the other territory of the United States may be annexed is very similar to the one just discussed and may be answered in much the same manner. For this purpose we may borrow the words of the report of the Committee favoring the annexation of Hawaii: "The fact that territory is contiguous or noncontiguous is to be considered in reference to the policy or expediency of annexation, but it is submitted that both on principle and precedent there is all the constitutional power necessary to accomplish

<sup>26</sup> "The case being within the words of the rule, must be within its operations likewise, unless there be something within its literal construction so obviously absurd or mischievous, or repugnant to the general spirit of that instrument as to justify those who expounded the Constitution in making it an exception." *Dartmouth College v. Woodward* (4 Wh. 518).

annexation in any case where annexation is deemed to be to the interest of this country. The fact that territory is contiguous or noncontiguous can have no bearing upon the constitutionality of its acquisition; but simply goes to affect the value of the territory proposed to be annexed. On general principles, if it is contiguous, it is more easily governed and defended. But whether this is so or not depends upon circumstances. In these days distance is not a matter of miles, but of hours. When California was annexed it was two months distant from the centre of civilization in the United States. Honolulu to-day lies only ten and a half days from Washington. As to the arguments presented in favor of the unconstitutionality of the annexation of noncontiguous territory, it is submitted that because our forefathers of 1776 did not discuss or contemplate any given proposition is no reason, constitutional or otherwise, why their children should not discuss and contemplate any and every problem which is presented to them in 1897 upon its merits, whether their ancestors ever heard of such subject or not. It is further submitted that the precedents in United States history are all against the unconstitutionality of the annexation of noncontiguous territory. Alaska is separated from the United States by a vast foreign territory. Midway Island is approximately three thousand miles from the American coast. The Aleutian Islands, reaching almost to the Asiatic coast, extend twelve hundred miles west of Alaska, and the Guano Islands are scattered all over the Pacific and the Caribbean Sea." <sup>27</sup>

**§ 236. The Right to Annex Based on the Treaty and War-Making Powers.**

As has been incidentally indicated in the preceding pages, the Supreme Court has held that whether or not the right to admit States into the Union carries with it the power to acquire new territory, this power is derivable from the authority of the General Government to declare and carry on war, and to enter into treaties. This it has repeatedly declared, both in earlier cases and in the later so-called Insular Cases.

In *American Insurance Co. v. Canter* <sup>28</sup> Marshall said, without, apparently, deeming an argument necessary: "The Constitution confers absolutely upon the government of the Union the power of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty." In *Fleming v. Page* <sup>29</sup> Taney said: "The United States . . . may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they

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<sup>27</sup> Sen. Rpt. 681, 55th Cong., 2d Sess., pp. 47, 48.

<sup>28</sup> 1 Pet. 511.

<sup>29</sup> 9 How. 603.



have suffered, or to reimburse the government for the expenses of the war." In *Stewart v. Kahn*,<sup>30</sup> the court said: "The war power and the treaty-making power each carries with it authority to acquire new territory." And in *United States v. Huckabee*<sup>31</sup> it was declared: "Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States."

It is to be observed that in none of these cases is there any argument to show just why, and in what manner, the acquiring of the foreign territory is a necessary or proper means by which war may be carried on, or treaties entered into. In fact it will be seen that the acquiring of foreign territory has been treated as a result incidental to, rather than as a means for, the carrying on of war and the conducting of foreign relations.

This leads us to the consideration of the doctrine which, constitutionally speaking, appeals to the author as the soundest mode of sustaining the power of the United States to acquire territory, as well as the one which, in application, affords the freest scope for its exercise. According to this doctrine, the right to acquire territory is to be searched for not as implied in the power to admit new States into the Union, or as dependent specifically upon the war and treaty powers, but as derived from the fact that in all relations governed by the principles of International Law the General Government may properly be construed to have, in the absence of express prohibitions, all the powers possessed generally by the sovereign States of the World. This doctrine thus is that the control of foreign relations being exclusively vested in the United States, that government has in the exercise of this jurisdiction the same power to annex foreign territory that is possessed by other sovereign States. The argument in support of this doctrine has already been given in Chapter XXXVI of this treatise.

In one instance at least, the United States has acquired territory under an authority which could not be, and was not alleged to be, derived from the treaty-making power or from any other specific express power, but was upheld by the Supreme Court as based upon the general sovereignty of the nation with respect to all matters that fall within the field governed by international law.

In 1856 Congress, by a statute which was reenacted in the Revised Statutes, declared that whenever any citizen of the United States shall discover a deposit of guano on any island, rock or key not within the lawful jurisdiction of any other government, and shall take possession thereof, such island, rock or key may, at the discretion of the President, "be considered as appertaining to the United States." Furthermore, the act goes on to declare all crimes committed on such island, rock or key to be punishable according to United States law in the Federal courts. Upon one

<sup>30</sup> 11 Wall. 493.

<sup>31</sup> 16 Wall. 414.



Jones being convicted of murder under the provisions of this statute he took an appeal to the Supreme Court upon the ground that the Federal law and Federal court could not take cognizance of acts committed on the island in question because that island was not constitutionally a part of the United States. In overruling this plea the Supreme Court spoke as follows: "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning Guano Island. . . . Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." <sup>32</sup>

This case thus not only practically upheld the right of the United States to acquire territory by discovery and occupation, but applied the principle that the United States may exercise a power not enumerated in the Constitution, provided it be an international power generally possessed by sovereign States.<sup>33</sup>

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<sup>32</sup> Jones v. United States (137 U. S. 202).

<sup>33</sup> A clear statement of the power of the United States to annex territory because of its national sovereignty was made by Senator Foraker, in the United States Senate July 1, 1898, in a debate with reference to the annexation of Hawaii. Speaking of the original thirteen States before they came into the Union, he said: "Each one of those sovereign States had every power that sovereignty enjoys ordinarily, and among the powers so enjoyed by each one of the sovereign States was the power to make treaties with foreign nations, and any kind of a treaty it might choose to make, because there was no restriction unless by itself upon the exercise of that power. It could make war; it could make a treaty for the acquisition of territory; it could annex in any way it saw fit to annex. But, Mr. President, no Senator will contend here that any State in this Union has that power now. That power has been lost to each and every State of the Union. As the price for coming into the Union, it was required to surrender it. The Constitution of the United States prohibits to the States the exercise of the treaty-making power with foreign nations. It prohibits all kinds of transactions on the part of States with foreign nations. No State could acquire territory by treaty in any other manner. Therefore each one of the States in the Union has surrendered that power of sovereignty. No one of them has it. Are we to be told that that inherent power of sovereignty, which every State enjoyed before it came into the Union, has been lost to the States and has not been given to any other power? What has become of it? Where

## § 237. Constitutional Power to Alienate Territory of the United States.

The power of the United States to alienate territory belonging to itself

has it gone? Our contention is that when to the States was denied this power, which they had a right to exercise as a sovereign power, it went by implication to the General Government among the implied powers, and it is not any 'higher law.' It seems to me it is but the necessary and legitimate result of a fair construction of the provisions of the Constitution."

This theory has been declared by several publicists, and in a number of *obiter dicta*, of the Supreme Court. Thus Magoon in his Report to the War Department on the "Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States During the War with Spain," says: "The United States derives the right to acquire territory from the fact that it is a nation; to speak more definitely, a sovereign nation. Such a nation has an inherent right to acquire territory, similar to the inherent right of a person to acquire property." So also Mr. Charles A. Gardner declares: "The nation needs no express grant of power for any international act. . . . The right to acquire territory irrespective of its situs, contiguous or foreign, by conquest, treaty, purchase or discovery, is an acknowledged and well established attribute of sovereignty and has been exercised by sovereigns from the beginning of recorded history. No one pretends that the right is specifically enumerated in the Constitution. Hence it remains an attribute of the sovereign people, and Congress and the President, the sole agents and trustees of that sovereignty, have exclusive and unrestricted power to exercise it. I advance the proposition with deference that this right is itself a primary and substantive attribute of sovereignty, as is the right of national existence or self-defence; and I shall regard it in this discussion as the primary and fundamental authority for territorial expansion." (Pamphlet entitled "Our Right to Acquire and Hold Foreign Territory." Published 1899.)

For an excellent argument for the support of the position here taken see also the prize essay of Mr. W. H. Bikél, entitled "The Constitutional Power of Congress Over the Territory of the United States," and published as a supplement to the American Law Register for August, 1901. See also Butler, "The Treaty-Making Power of the United States." Butler declares his opinion to be: "That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to every subject which can be made the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any matter whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government."

By the tripartite convention of 1899 (ratified by the United States Senate, January 16, 1900), Great Britain and Germany renounced in favor of the United States all their "rights and claims over and in respect to, the eastern Samoan Islands." Previous to this, these islands had been jointly administered by the Three Powers, but sovereignty over the islands was not claimed by the Powers. On April 17, 1900 and July 14, 1904 the chiefs of these islands formally ceded their islands to the United States and this cession was accepted by the President of the United States, and it is upon this ground that the United States basis its claim to sovereignty over the islands. In this case there was, thus, neither a treaty nor action upon the part of Congress, nor had there been military conquest. Midway and Wake Islands, and Horseshoe Reef were acquired in an equally informal manner.

by an exercise of its treaty powers is considered in a later Chapter.<sup>34</sup> The question which will be considered in the present Section is as to the constitutional right of Congress, by legislative action, to grant independence to an area and its inhabitants which has come under the sovereignty of the United States. This question has been considerably discussed in connection with the executive and congressional promises that have been made with regard to the granting at some future time of independence to the Philippine Islands, and with the strong agitation that has existed among the leaders of the inhabitants of those islands, and, to some extent, among persons in the United States, that immediate or early effect should be given to such promises. With regard to the moral obligation or the political expediency of such action, this treatise is not concerned. So far, however, as a question of constitutional authority so to act is involved, it is appropriate to consider it.

The best argument with which the writer is familiar in denial of the right of Congress to grant independence to the Philippines or to other areas and their inhabitants similarly circumstanced, is that of Daniel R. Williams in an article contributed to the *Virginia Law Review*.<sup>35</sup>

The fact that the Philippine Islands have not been, by Congress, "incorporated" into the United States is without constitutional significance, for it is incontestible that, by the treaty with Spain, they were brought under the sovereignty of the United States. That Congress has not been expressly given the power to alienate territory which has come or been brought under American sovereignty is equally certain. Certain also is it that there has been no judicial pronouncement that Congress has this constitutional power, for there has been no exercise by Congress of such a power, and, therefore, no opportunity for its judicial examination even were it possible to raise the point in such a manner as to enable or compel the courts to pass upon it. Mr. Daniels is, however, able to adduce certain judicial statements which possibly imply that Congress has not the power in question, and he, as well as Mr. Fairchild are able to adduce certain statements of public men at the time of the adoption of the Constitution and especially in the Virginia ratifying convention that the Constitution was not to be construed as granting the power. It scarcely needs be said, however, that these judicial dicta are *obiter*, and that statements made by particular individuals in the State Convention of a particular State at the time the Constitution was adopted have no controlling authority. Mr. Williams, however, lays emphasis

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<sup>34</sup> See § 317.

<sup>35</sup> November, 1925: "Is Congress Empowered to Alienate Sovereignty of the United States." Supplementing this article reference may be made to the historical argument of Mr. George H. Fairchild as to the doctrines of the framers and adopters of the Constitution, published by the American Chamber of Commerce at Manila. Mr. Williams' article was reprinted in the *Congressional Record* of April 16, 1926.

upon the proposition that, in the United States, the ultimate sovereignty is in the people, and that, when territory is acquired by the United States, it is held in trust for their benefit, and, therefore, that they should not be deprived of that right except by an express consent thereto given by them to Congress.<sup>36</sup> Here, again, it is to be observed that these dicta are *obiter*, even if they can be held to state a legal rather than a moral obligation, or disassociated from the facts of the cases in which they were stated, or from the particular circumstances surrounding the particular territories which the courts had in mind when making them.

The argument which Mr. Williams makes that the power to alienate is not contained in the grant to Congress of the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"<sup>37</sup> would be a strong one if the interpretation of this provision were approached as an original proposition. It is the opinion of the author of this treatise that a proper interpretation of this constitutional provision would restrict its application to the proprietary rights of the United States in the property within territories subject to the jurisdiction of the United States as well as in the States of the Union, but the fact is that the Supreme Court, as will be later shown<sup>38</sup> has repeatedly and definitely committed itself to the proposition that this grant relates to political or jurisdictional rights of the National Government as well as to proprietary rights. It would seem, then, that, giving to the provision this political as distinguished from merely proprietary signification, it would follow that the power granted to Congress to "dispose" of territory belonging to the United States implies not merely a right to sell the lands or other property of the United States, but to release the political sovereignty of the United States over such territories by sale or cession to another power, or, simply, by withdrawing its own sovereignty and thus recognizing the independence and self-sovereignty of such territory.

The constitutional right of the United States to bring what has formerly been alien territory under its own sovereignty by other processes than through the exercise of the treaty-making power, or as incidental to the

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<sup>36</sup> As to this Mr. Williams quotes from *Shively v. Bowlby* (152 U. S. 1), the statement: "Upon acquisition of a territory by the United States whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory." Also the statement of Chief Justice Taney in *Dred Scott v. Sandford* (19 How. 393), that "it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union."

<sup>37</sup> U. S. Const., Art. IV, Sec. 3.

<sup>38</sup> *Post*, Chapter XXV.

waging of war,<sup>39</sup> being established, it may be assumed that, could the question come before it in such a manner as to be judicial, that is, non-political in character, the Supreme Court, by a parity of reasoning, would hold that Congress has the power to release territory from beneath the sovereignty of the United States,—alienation being the correlative of acquisition.

Leaving aside, however, the foregoing observations which have been in the nature of a rebuttal of the arguments of those who would deny to Congress the right to release sovereignty over territory that has once come under the sovereignty of the United States, and approaching the matter from the affirmative side, it seems clear to the author of this treatise that the constitutional right in question can be sustained as a right "resulting" from the fact that, viewed internationally, the United States is a sovereign power, and, except as expressly limited by the Constitution, is to be viewed as possessing within the field of international relations all those powers which, by general international usage, sovereign and independent States are conceded to possess, and that, among such conceded powers is that of parting with, as well as acquiring, political jurisdiction over territory. The propriety of resorting to this attribute of national sovereignty as a source of constitutional authority has been earlier discussed,<sup>40</sup> and further applications of the doctrine appear in connection with the discussion of specific matters, as, for example, the exclusion and expulsion of aliens, the penalizing of the counterfeiting in the United States of the public securities of foreign States, etc., and it will be sufficient here again to quote the language of the Supreme Court in the case of *MacKenzie v. Hare* <sup>41</sup> in which it was held that Congress might, upon reasonable grounds, deprive American citizens of their status as such. The court said: "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern the relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."

It is to be repeated that the foregoing discussion has had exclusive relation to the alienation of American territory by other processes than the exercise of the Treaty-Making Power. That, through an exercise of the treaty power, American territory may be alienated is abundantly clear, as will be later shown. Of course, however, this power could not be availed of if the United States should decide to grant full independence to the Philippine Islands or to any other area, for, in such case, not until such independence became a fact would there be any other sovereignty with which the United States could deal by means of a treaty. In other words, the United

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<sup>39</sup> As to this see Chapter XXIII.

<sup>40</sup> § 57.

<sup>41</sup> 239 U. S. 299.

States could, by a treaty recognize the independence of the Islands, but it could hardly be held, as a logical proposition, that that independence owed its existence to the treaty.

A further fact which needs to be considered with reference to the determination of the constitutionality of such recognition of independence is the question whether the courts would, in any event, feel themselves justified in passing upon it; for, as will later appear,<sup>42</sup> it is an established doctrine that the determination of the status of another Government or the sovereign or non-sovereign character of another State is a "political question" the final and conclusive determination of which resides in the so-called political departments of our Government, that is, in the executive and legislative departments. It may be assumed, therefore, that, should Congress and the President, by joint resolution or otherwise, recognize the sovereignty and independence of the Philippine Islands, the courts would accept that as a fact and would not assume jurisdiction to examine into the constitutionality of the processes or determinations, executive or legislative, by means of which that status was created or recognized.<sup>43</sup>

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<sup>42</sup> § 851.

<sup>43</sup> Judge Malcolm in his scholarly treatise *The Constitutional Law of the Philippine Islands* (2d ed. 173-183), expresses strongly the opinion that the United States has the constitutional right to declare or recognize the independence of the Philippine Islands.

## CHAPTER XXIV

### THE MODES IN WHICH, AND PURPOSES FOR WHICH, TERRITORY MAY BE ACQUIRED BY THE UNITED STATES

#### § 238. Constitutional Modes of Acquiring Territory.

Having discussed the constitutional power of the United States to acquire territory whether by treaty, conquest, or discovery and occupation, we now approach the question as to the modes by which this Federal authority may be exercised.

A history of the territorial expansion of the United States shows that territories have been annexed in three different ways: (1) by statute, (2) by treaty, and (3) by joint resolution of the two Houses of Congress; (4) by executive act.

The process of extending American sovereignty by simple statute and executive action authorized thereby was illustrated, as we have just seen, in the case of the Guano Islands. The annexation of territory by treaty has been the method most usually employed. The Louisiana Territory, Florida, Alaska, the Mexican cessions, the Samoan Islands, Porto Rico, and the Philippines were obtained in this manner. The constitutionality of this mode of acquisition has already been discussed.

#### § 239. Annexation by Joint Resolution.

In two instances, that of Texas in 1845, and Hawaii in 1898, the sovereignty of the United States has been extended over new territory by means of a Joint Resolution of the Houses of Congress. In the case of Texas an attempt had been made to annex the State by treaty, but this effort, requiring a two-thirds favorable vote in the Senate, had failed. Thereupon the same end was secured by a Joint Resolution which needed but a simple majority vote in each of the two branches of the national legislature, with, of course, the approval of the President. This resolution provided that "Congress doth consent that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new State to be called the State of Texas with a republican form of government to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of the Union." Upon Texas taking the action called for by this clause, Congress later by Joint Resolution declared Texas one of the States of the American Union.

The peculiarity of the annexation of this State was not simply that it came under American sovereignty by Joint Resolution but that it became at once one of the States of the Union, and thus never had the transitional

Territorial status. This fact, indeed, gave additional constitutional support to the action of Congress in the matter, for to that body is given by the Constitution the right to admit new States into the Union, and, therefore, its admission of Texas to fellowship with other American commonwealths might easily be construed as a legitimate exercise of that power.

The acquisition of the Hawaiian Islands was another instance of the extension of the United States sovereignty by a simple Joint Resolution of the two branches of Congress. In this case, however, the islands were not, as was Texas, admitted as a State or States of the Union, but were simply brought under the sovereignty of the United States.

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. The incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is, it was argued, essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts. Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted. To meet this point Senator Foraker argued that though a treaty might be the proper mode for annexing a portion of the territory of another State, it was inappropriate when an entire State was to be annexed by another. "I agree," he said, "with Senators on the other side that a treaty is a contract—that has been your contention throughout—until the treaty has been signed on both sides. The very minute that is done one of the parties is gone, and there is no continuing contract. Therefore it is simply a cession on their part and an acceptance on ours, and it might be done just as well by legislation as otherwise."

In the report made March 16, 1898, by the Senate Committee on Foreign Relations<sup>1</sup> in favor of the Joint Resolution of Annexation, the annexation of Texas was cited as a precedent and in addition the assertion made that for annexation the consent of the government of the annexed territory is needed but not, necessarily, that of its populace.<sup>2</sup>

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<sup>1</sup> Senate Report 681, 55th Cong., 2d Sess.

<sup>2</sup> "This Joint Resolution [annexing Texas]," the Committee declared "clearly establishes the precedent that Congress has the power to annex a foreign State to the territory of the United States, either by assenting to a treaty of annexation or by agreeing to articles of annexation or by act of Congress based upon the consent of such foreign government obtained in any authentic way. No exercise of power could be more supreme than that under which Texas was annexed to the United States, either as to its scope or the manner of the annexation or the choice of conditions upon which Congress would merge the sovereignty of an independent republic into the supremacy of the



The assertions here made by the Committee that the annexation of Texas constituted a precedent for annexation by legislative act, the consent of the constituted governmental authorities of the annexed territory being obtained, is open to question. For it will be remembered that Texas was admitted directly into the Union as a State, and, therefore, its admission could be upheld as an exercise of the power given to Congress and the President to admit new States into the Union.

**§ 240. Consent of Inhabitants of Annexed Territory Not Required.**

As to the question whether it be necessary to obtain the consent of the inhabitants of the Territories to be annexed, it may be said that this is, or may be, a matter of justice and political expediency but not of legal necessity. The act of annexation being, *ex hypothesi*, an act of sovereignty, statutory or by treaty, its legal force is derived from the body which performs it, and it would be an error to hold its legal force necessarily dependent upon a consent obtained from some other source. There would, of course, be no legal objection to Congress providing, should it see fit, that the going into effect of an act of annexation should be dependent upon its approval by the inhabitants of the territory to be annexed, just as in its "enabling acts" for the admission of Territories as States, or in many of its acts with reference to the Indians, it has provided that the consent of those directly concerned should be obtained. But this is not

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United States. The act also establishes the fact that a treaty with a foreign State which declares the consent of such State to be annexed to the United States, although it is rejected by the Senate of the United States, is a sufficient expression and authentication of the consent of such foreign State to authorize Congress to enact a law providing for annexation, which, when complied with, is effectual without further legislation, to merge the sovereignty of such independent State into a new and different relation to the United States and toward its own people. It further establishes the fact that Congress, in legislating upon the question of the annexation of a foreign State, rightfully acts upon the consent of such State, as the sovereign representative of its people, and that the power of Congress to complete the annexation of such foreign State depends alone upon the sovereign will and consent of such State, given and expressed through its organized tribunals. It further establishes the fact that Congress cannot acquire the right or jurisdiction to annex a foreign and independent State through a vote of a majority of its people, in opposition to the will of its constituted authorities. It is the constitutional power of Congress that operates to annex foreign territory. Such a proceeding on the part of Congress as the submission of the question to vote of the people of such a State would only create disorder and revolution in a foreign State applying through its constituted authorities for admission into the United States. This important, clear, and far-reaching precedent established in the annexation of the Republic of Texas is a sufficient guide for the action of Congress in the passage of the Joint Resolution herewith reported. If, in the judgment of Congress, such a measure is supported by a safe and wise policy, or is based upon a national duty that we owe to the people of Hawaii, or is necessary for our national development and security, that is enough to justify annexation, with the consent of the recognized government of the country to be annexed."

a matter of legal necessity. It is not a division or a delegation of legislative power, either of which would be necessarily unconstitutional.

Nor is there any principle of public law, or general precedent from our own practice that requires the consent of the population of an annexed territory to be obtained. In none of the instances, except that of Texas, has the United States deemed this consent necessary.<sup>3</sup>

As earlier shown, it is quite usual to provide in treaties of annexation that the people of the territories transferred shall have an election whether they shall become citizens of the annexing State or retain their old national status. But this, of course, is a question quite distinct from the transfer of the sovereignty over the territory in question.

Though it thus appears that territory may be annexed without the consent of the people, it has not yet been shown that, in fact, a legislative act is constitutionally adequate for the purpose. It has been shown that the admission of Texas by a Joint Resolution of Congress directly into the Union as a State could be justified as an exercise of the power given to Congress by the Constitution to admit new States into the Union, and did not, therefore, establish a precedent for the annexation of Hawaii. To the author's mind the annexation of Hawaii by legislative act, was constitutionally justified upon the same ground that the extension of American sovereignty by statute over the Guano Islands was justified; namely, as an exercise of a right springing from the fact that, in the absence of express constitutional prohibition, the United States as a sovereign nation has all the power that any sovereign nation is recognized by international law and practice to have with reference to such political questions as the annexation of territory.

In addition to this source of authority, it would be also quite reasonable to argue that the annexation of the Hawaiian Islands by act of Congress was a "necessary and proper" measure for the military defence of the nation, and for the protection and increase of our foreign commerce; for there can be no question but that a conceived military and commercial need was one of the strongest of the motives that operated to bring about the annexation.<sup>4</sup>

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<sup>3</sup> Hawaii was annexed at the request of the Hawaiian Government but it cannot be said that the United States made a favoring popular vote a condition precedent to annexation. Upon the general international practice, see Solière, *Le plébiscite dans l'annexion*. 1901. Hall, *International Law*, 4th ed., p. 49, says: "The principle that the wishes of a population are to be consulted when the territory they inhabit is ceded has not been adopted in international law, and cannot be adopted into it until title by conquest has disappeared." Cf. Moore, *Digest of Int. Law*, § 83; and Mattern, *The Employment of the Plebiscite in the Determination of Sovereignty*.

<sup>4</sup> The Committee (Senate Report 681, 55th Cong., 2d Sess.) in its report favoring annexation of Hawaii, said: "As the place—the only one—in the North Pacific Ocean for the concentration of cable lines; for obtaining coal, water, or provisions for ships; for the repair of vessels; or for the storage of goods in bond, or otherwise, from all coun-

The question as to the constitutionality of the annexation of Texas or of Hawaii has never been directly raised and passed upon by the Supreme Court of the United States. In fact, however, the court has of course impliedly recognized the validity of the annexation both of Texas and Hawaii in every case in which it has enforced the laws of, or Federal laws relating to, these territories. That the point has not been directly raised is due to the principle uniformly declared by the court, when the point has, in other instances, been raised, that the territorial limits of sovereignty is a question the decision of which by the political branches of the government is absolutely binding upon its judiciary.

With reference to the annexation of the Philippine Islands, the point was raised by certain "Anti-Imperialists" that the United States did not obtain a valid title for the reason that Spain had never reduced some of them to possession; and that, as to others, at the time of transfer neither she nor the United States was in effective occupation. This, however, was not a question of constitutional, but of international law—one, that is, that a foreign power might possibly raise, but which could not be considered in our courts.

#### § 240a. Annexation by Executive Act.

The sovereignty of the United States over the eastern Samoan Islands appears to rest upon no other basis than the acceptance by the President of the cession made by the chiefs of those islands.<sup>5</sup> Congress has since, by implication, but not in express terms, given its approval to this executive action.

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tries for the purposes of trade around the whole circuit of the coasts of the Pacific Ocean, and with its numerous islands, the Hawaiian Islands are the central point of distribution which can have no possible competitor. This enormous advantage to our trade in the islands and across the Pacific Ocean must be felt by every industry in the United States. Their separation by a distance of 2,000 miles from all other lands, and their central location as to every point on the great arc of the circle that extends from the Mexican border almost to the coast of Siberia, the Pacific frontier of Alaska, Washington, Oregon, and California, makes the Hawaiian Islands the most important point in the seas of the Western Hemisphere for the fostering and protection of our coastwise and foreign commerce. As ships of war are the necessary complement of ships of commerce, these great advantages belonging to the geographical location of the Hawaiian Islands are equally indispensable to our Navy, as the protector of our commerce, coming from both the Atlantic and Pacific Oceans. On the commercial and military views of these questions the opinions of merchants and navigators, and of our naval officers, as to the developments and necessities of the future—as yet unknown—are our most intelligent and safest guides. The Committee can appeal to these sources of information and safe forecast with the confidence that comes from their almost unanimous agreement."

<sup>5</sup> See report "American Samoa," p. 55,—a general report by the Governor (U. S. Government Printing Office, 1927).

## CHAPTER XXV

### THE CONSTITUTIONAL SOURCES OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES

#### § 241. Power to Govern Territories Not Questioned.

There has never been any question as to the power of the United States to govern the territories possessed or acquired by it and not included within the limits of any of the individual States. The only question has been as to the source and extent of this power. This Federal authority to govern has been derived from three sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" (2) The implied power to govern derived from the right to acquire territory; and (3) The power implied from the fact that the States admittedly not having the power, and the power having to exist somewhere, it must rest in the Federal Government.

All three of these sources of authority have been, at different times, recognized by the Supreme Court.

The earliest case is that of *Sere v. Pitot*,<sup>1</sup> decided in 1810, with reference to the Territory of Orleans. In his opinion Marshall said: "The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold property. Could this position be contested, the Constitution of the United States declares that 'Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

From this it will be seen that both the first and second sources of authority mentioned above were relied upon. Marshall himself was plainly of the opinion that the power to govern is a necessary incident to the power to acquire, but indicated that this view might possibly be contested.

In *American Insurance Co. v. Canter*,<sup>2</sup> decided in 1828, with reference to the government of Florida, Marshall used the following language: "In the meantime [until it is admitted as a State] Florida continues to be a Territory of the United States; governed by virtue of that clause which

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<sup>1</sup> 6 Cr. 332.

<sup>2</sup> 1 Pet. 511.

empowers Congress 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.' " He added, however: "Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

Here, then, all three of the possible sources of the authority of Congress to govern acquired territory were referred to, though the two latter were only suggested as possible sources.

In *United States v. Gratiot*,<sup>3</sup> decided in 1840, it was declared: "The term territory as here used [Art. IV, Section III] is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest."

In *Cross v. Harrison*,<sup>4</sup> decided in 1853, with reference to territory acquired from Mexico, the court said: "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting territory and other property belonging to the United States."

In *United States v. Guthrie*,<sup>5</sup> decided in 1854, Justice McLean in a dissenting opinion declared: "The power under which the territorial governments are organized is a matter of some controversy. . . . It seems to me that the power to govern a territory is a necessary consequence of the power given 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' No one doubts the power of Congress to sell the public lands beyond the limits of any State; and this renders necessary the organization of a government for the protection of the persons and property of the purchasers. This is an implied power, but it necessarily results from the power to sell the public lands." <sup>6</sup>

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<sup>3</sup> 14 Pet. 526.

<sup>4</sup> 16 How. 164.

<sup>5</sup> 17 How. 284.

<sup>6</sup> It is worthy of note, that, though McLean relies upon an express grant of power given Congress in Article IV, Section III, he construes this to be not a direct grant of governing power, but of a power to dispose of lands which carries with it the implied power to govern.

### § 242. Doctrines of the Dred Scott Case.

This review of decisions brings us chronologically to the Dred Scott case. Up to this time, it is to be observed that the chief reliance for the power to govern the territories had been the grant of authority contained in Article IV, Section III. It is also to be observed that recourse to this source of authority was subject to the possible limitation that it applied only to territories possessed by the United States at the time the Constitution was adopted, and, therefore, that it could not be appealed to for authority to govern areas acquired since that time; also that, over such territories as it is applicable to, it does not grant to the Government general governing powers, but only such as are necessary and proper for disposing of and regulating the public lands as property, and preparing them and their inhabitants for admission to the Union as States.

This was the position assumed by the majority of the court in the great case of *Scott v. Sandford*,<sup>7</sup> decided in 1857.

This case we have already discussed with reference to its bearing upon citizenship in the United States. We have now to examine it in its bearing upon the status of Territories.

This suit, it will be remembered, was one brought by Dred Scott, a negro, who had been owned and held as a slave in the State of Missouri, had been carried by his master first to the State of Illinois, where slavery did not exist, where he remained for two years; then to the Territory then known as Upper Louisiana, from which slavery had been excluded by the Missouri Compromise Act of 1820; and finally brought back to Missouri. Scott alleged that by being carried by his master voluntarily into the free State of Illinois and the free Territory he became a free man. He thereupon brought suit in the nature of an action of trespass against his master for restraining his liberty. The suit was brought in a Federal court, the jurisdiction of the Federal court being based upon a diversity of citizenship, Scott claiming to be a citizen of the State of Missouri, and Sandford, the defendant, being a citizen of the State of New York. The plea in abatement that Scott was not a citizen of a State within the constitutional sense, has already been considered.

A plea in bar was filed which set up that Scott was still a slave, and that, therefore, no legal injury had been done him by the defendant; that when he was taken into Illinois as a slave and held there as such, and brought back by his master to Missouri, his status as fixed by the laws of Missouri was not changed; and that, as for his being carried into the free Territory of Upper Louisiana, Congress had had no constitutional power to exclude slavery therefrom, as it had attempted to do by the act of 1820. It was in passing upon this last point that the court found it necessary to examine as to the constitutional power of the United States to acquire foreign territory and to govern it when acquired.

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<sup>7</sup> 19 How. 393.

The case was first argued in 1856 and at that time the majority of the court were of the opinion that it would not be necessary to consider the question whether or not Scott was a citizen, but that the case could be decided upon its merits, namely, that Scott, being originally a slave, his being carried into Illinois and Upper Louisiana did not affect his status after his return to Missouri; that, in other words, the law of Missouri as determined by the highest courts of that State should govern the Supreme Court in its disposition of the case. This decision, it will be observed, made it unnecessary for the court to pass upon either the question as to whether a free negro could become a citizen of a State in the constitutional sense of the term, or the question as to the power of Congress to prohibit slavery in the Territories. To Justice Nelson was assigned the preparation, upon this basis, of the opinion of the court, and the individual opinion which he finally read was the one prepared for this purpose. In this opinion he said: "In the view we have taken of the case, it will not be necessary to pass upon this question [of citizenship], and we shall therefore pass at once to an examination of the case on its merits." Justice Nelson did later say, however: "It is perhaps not unfit to notice in this connection that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress [of 1820], even within the Territory to which it relates, was not authorized by any power under the Constitution." But he went on to say that whether it was valid or not, the act could have no operation or effect within the limits of the State of Missouri, and could not, therefore, affect the status of the plaintiff after his return thither.

A second argument of the case having been asked for and had, five justices agreed that the plea in abatement was not properly before the court and that, therefore, the case would have to be decided upon the merits.

With the judgment of the court as to the effect of the laws of Congress governing the Territory of Upper Louisiana and of the State of Illinois upon the status of Scott after his return to Missouri we are not here concerned. That which does concern us is that six of the nine justices held that the power of Congress over the Territories was of such a limited character as to render unconstitutional an attempt to exclude slavery from them.

The Chief Justice, who was among those who took this position, argued as follows: "The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' but in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was



claimed by, the United States, and was within their boundaries as settled by the Treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular Territory, and to meet a present emergency, and nothing more. A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition."<sup>8</sup>

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<sup>8</sup> After reviewing the circumstances leading up to the cession by the individual States to the Confederacy of their claims to western lands, and after adverting to the fact that the Confederacy had no constitutional power to accept the grant or to enact the Northwest Ordinance of 1787 for its government, he said: "This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their power of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a government and system of jurisprudence should be maintained in it; to protect the citizens of the United States, who would migrate to the Territory, in their rights of person and of property. It was also necessary that the new government, about to be adopted, should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the General Government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States when acting in their independent characters as confederates, which neither the new government nor any one else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire. The language used in the clause, the



It has often been stated that in this case Chief Justice Taney and all those Justices who agreed with him, held that the United States might increase its territory only by the admission of new States. This is not quite correct. These justices did, indeed, hold that foreign territory might be acquired only for the purpose of admitting new States; but the annexation of areas with this end in view, they agreed, might be effected by an exercise of the treaty-making or other powers. Upon this point Taney declared: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character. . . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State

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arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the Territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any Territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States—that is, to a Territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the article. It then gives the power which was necessarily associated with the disposition and sale of the lands—that is, the power of making needful rules and regulations respecting the Territory. And whatsoever construction may now be given to these words, every one, we think, must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new government might afterwards itself obtain by cession from a State, either for its seat of government, or for forts, magazines, arsenals, dockyards, and other needful buildings. . . . This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence."

upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the government, and not the judicial; and whatever the political department of the government shall recognize as within the limits of the United States the judicial department is also bound to recognize, and to administer in it the laws of the United States, so far as they apply, and to maintain in the territory the authority and rights of the government; and also the personal rights and rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed."

With the exception of Justice Curtis, none of the other justices discussed at length the source of the power to acquire territory. Five of the other justices, however, concurred with the Chief Justice in holding the act of 1820 unconstitutional, and, therefore, where they do not expressly say so, may be presumed to have agreed with him as to the source whence and the purpose for which foreign territory might be acquired, and as to the restriction of the authority granted by Congress by Article IV, Section III, to the territories possessed by the United States in 1787.

Justice Curtis in his dissenting opinion declared that whatever doubt there may have been as to the power of the United States to acquire additional territory, four precedents and several judicial sanctions had established its existence beyond doubt.<sup>9</sup> The power to govern this acquired territory Curtis found in Article IV, Section III.<sup>10</sup>

<sup>9</sup> Citing *American Insurance Co. v. Canter* (1 Pet. 511); and *Sere v. Pitot* (6 Cr. 332).

<sup>10</sup> He said: "There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purpose of the instrument, as it is with its language, and I can have no hesitation in rejecting it. I construe this clause, therefore, as if it had read, Congress shall have the power to make all needful rules and regulations respecting those tracts of country out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions as well as of the jurisdictions as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it. It has been argued that the words 'rules and regulations' are not appropriate terms in which to convey authority to make laws for the government of the Territory. But it must be remembered that this is a grant of power to the Congress—that it is, therefore,

The arguments and opinions in the Dred Scott case revealed the difficulties involved in a recourse to Article IV, Section III, for the power to govern acquired territories, and, accordingly, since that date we find the Supreme Court emphasizing the doctrine that the power is implied in the right to acquire, as well as arguable from the fact that, inasmuch as the States have no authority in the premises, the Federal Government must have it. Thus in *United States v. Kagama*<sup>11</sup> the court said: "The power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which its territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else." In the *Late Corporation of the Church of Jesus Christ v. United States*<sup>12</sup> the court said: "The power of Congress over the Territories of the United States is . . . general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property of the United States, it would be absurd to hold that the United States has the power to acquire territory, and no power to govern it when acquired." Here, though Section III of Article IV is indeed referred to, the power to acquire is clearly emphasized as the source of the power to govern. Finally in *De Lima v. Bidwell*,<sup>13</sup> one of the so-called "Insular Cases," the court said: "It [the power to govern] is an authority which arises not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the States to act on the subject."

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necessarily a grant of power to legislate—and certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the Territory, is a power to pass all needful laws respecting it. . . . Without government and social order there can be no property; for without law, its ownership, its use and the power of disposing of it cease to exist, in the sense in which those words are used and understood in all civilized States. Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the Territory, I cannot doubt that this is a power to govern the inhabitants of the Territory, by such laws as Congress deems needful, until they obtain admission as States."

<sup>11</sup> 118 U. S. 375.

<sup>12</sup> 136 U. S. 1.

<sup>13</sup> 182 U. S. 1.

## CHAPTER XXVI

### THE EXTENT OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES

#### § 243. Power to Govern Absolute.

Since the time when the necessity for the exercise of the authority arose, there has been almost no question as to the absolute power of Congress to determine the form of political and administrative control to be erected over the Territories, and to fix the extent to which their inhabitants shall be admitted to a participation in their own government. Both by legislative practice and by judicial sanction, the principle has from the first been asserted that upon this matter the judgment of Congress is absolute.

This, however, has not been construed to carry with it the absolute control of the Federal legislature over the civil rights—the private rights of person and property—of the inhabitants of the Territories. The extent of the power of Congress with respect to these will be discussed in the next chapter.

The first act for the government of Territories, the "Ordinance for the Government of the Territory of the United States Northwest of the Ohio River," implied the doctrine that to Congress is given the complete discretion as to the form of government to be supplied,<sup>1</sup> and that the inhabitants of this region are not, except by congressional grant, entitled to local self-government. The act provided that "as soon as there shall be five thousand free male inhabitants, of full age, in the district" they shall receive authority to elect a representative legislative assembly, and that as soon "as may be consistent with the general interest," the territory is to be subdivided into States, which are to be admitted into the Union on an equal footing with the original States. Until, however, the Assembly is established, all governing power is vested in a governor, a secretary and a court of three judges, all nominated by the President and appointed by and with the consent of the Senate. During this period, then, there was to be no local self-government whatever.

By the act of May 26, 1790, the Southwest Territory was given a government in all respects the same as that erected for the Northwest Territory.

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<sup>1</sup> By act of August 7, 1789, the first Congress under the Constitution reenacted the ordinance of 1787, with the necessary change that the officers provided for by it should be nominated by the President and appointed by and with the advice and consent of the Senate.

By the act of October 31, 1803, passed for the government of the Louisiana Territory purchased from France, the President was given full power to take possession, using for this purpose such force as might be necessary, and "that, until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

A formal remonstrance against the autocratic régime thus established as being in violation of the rights guaranteed by the treaty with France, was presented in behalf of the inhabitants of the Territory to the United States Senate, but no question as to the constitutionality of the action was raised.

The act of March 3, 1819, for the taking possession and temporary government of Florida, was almost identical with the Louisiana Act of 1803.

Without attempting to trace further the legislation with reference to the government of the Territories it is sufficient to say that Congress has continued to the present day uniformly to consider this subject as one to be dealt with absolutely at its own discretion.<sup>2</sup>

Acting in pursuance of its powers, Congress has thus from time to time, as new territories have been acquired, established for them, by statutes, Territorial governments. The latest of these statutes are those establishing civil rule in Porto Rico and the Philippines.

#### § 244. Classes of Territorial Governments.

Generally speaking there have been but two kinds of Territorial Governments: unorganized and organized. The former have exhibited no elements of local self-government: they have been administered by officials nominated by the President and confirmed by the Senate, and have had for their laws such laws as have been given to them by Congress. Organized Territorial Governments, on the other hand, have chief executive and judicial officials who are nominated by the President and confirmed by the Senate and who hold office for terms of four years. Their legislatures consist of two Houses, each elected by those inhabitants of

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<sup>2</sup> For legislation of Congress with reference to the Territories, see W. F. Willoughby, *Territories and Dependencies of the United States: Their Government and Administration*; Farrand, *The Legislation of Congress for the Government of the Territories of the United States*; *Organic Acts for the Territories of the United States with Notes Thereon*, Compiled from the Statutes at Large of the United States; also Appendix *Comprising Other Matters Relating to the Government of the Territories*. (Senate Document, No. 148, 56th Congress, 1st Sess.)

the Territories to whom have been given the suffrage by Federal law. The law-making power of these legislatures is, as a rule, extended by Congress "to all rightful subjects of legislation not inconsistent with the Constitution or laws of the United States." The laws passed in pursuance of this legislative authority are, therefore, subject to the scrutiny of the courts as to their validity and they may be amended or annulled at any time by an act of Congress.

The Territories of Alaska, Porto Rico, the Hawaiian Islands, and the Philippines may be spoken of as "organized," though their governments differ in details. Alaska received its present organized government in 1912. Porto Rico received its first civil government in 1900, but this Foraker Act was replaced by the present Organic Law in 1917, known as the Jones Act. By this act (Section 5) all persons who, under the Foraker Act had been designated as citizens of Porto Rico, were declared to be citizens of the United States. There were some who held that, by this action Porto Rico had been "incorporated" into the United States, but this was definitely negated by the Supreme Court in the case of *Balzac v. Porto Rico*.<sup>3</sup>

#### § 245. Hawaiian Islands and the Philippines.

The Hawaiian Islands are administered under the organic act of April 30, 1900, which act not only gave to them a complete system of government, but gave American citizenship to all those who, on August 12, 1898, had been citizens of the Republic of Hawaii.

After annexation to the United States, the Philippines were at first governed by the military authorities, then by a Civil Commission, then, in 1902, by an organic act passed by Congress, which was modified in 1907 and in 1916 in the direction of giving greater self-governing powers to the Filipinos, the law passed in 1916 being known as the Jones Act and being still in force.

#### § 246. Islands under Military Administration.

The United States possesses a number of islands of no considerable size, which have been and are more or less autocratically governed by military officers of the United States acting simply under executive orders of the President and without the aid of locally elected assemblies. Among such areas are the Samoan, Wake, Midway, and Guam Islands.

#### § 247. "Territory" and Organized Territory Defined.

Although the distinction between organized and unorganized territorial governments is often spoken of, there has been no precise statement, legislative or judicial, as to the essential *differentia* separating the two

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<sup>3</sup> 258 U. S. 298.

forms of congressional control. The fact, of course, is that the differences are of practical rather than of legal or constitutional significance. However, in specific cases, the court has been obliged to determine whether or not a territory is to be deemed to be included within the scope of the term "organized territory" as employed in specific statutes of Congress.

In *Re Lane* <sup>4</sup> the defendant, who had been convicted of an offence committed in Oklahoma when it was a part of the Indian Territory, under a statute of Congress which excepted "Territories" from its operation, raised the point that Oklahoma came within this exception. The Supreme Court, however, declared that the exception of the act had "reference exclusively to that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments." "These governments," the court continued, "have an executive, a legislative, and a judicial system. They have the powers which all these departments have exercised, which are conferred upon them by Act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not, in any sense, independent governments . . . yet they exercise nearly all the powers of government under what are generally called organic acts, passed by Congress conferring such powers on them. Oklahoma was not of this class of territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits as the territories of the United States have and have always had."

In *Kopel v. Bingham* <sup>5</sup> the question was as to the applicability to Porto Rico of the law of Congress relating to the extradition of fugitives from justice on demand of the executive of any State or "Territory." <sup>6</sup> The court held the law to be applicable, and, in the course of its opinion, quoted with approval the language from the opinion in *Re Lane*, which has been quoted above, and defined a "Territory" of the United States as follows: "A portion of the country not included within the limits of any State and not yet admitted as a State into the Union, but organized under the laws of the United States with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States."

In the case of *Binns v. United States*,<sup>7</sup> decided in 1904, the court held that Alaska was at that time "an organized territory." This it held on

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<sup>4</sup> 135 U. S. 443.

<sup>5</sup> 211 U. S. 468.

<sup>6</sup> At this time Porto Rico was governed under the Foraker Act (31 Stat. at L. 80), Section 14 of which provided that "the statutory laws of the United States not locally inapplicable, except as hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws."

<sup>7</sup> 194 U. S. 486.

the basis of the organic act of May 17, 1884,<sup>8</sup> which had declared that Alaska should "constitute a civil and judicial district, the government of which shall be *organized* [italics supplied] and administered as hereinafter provided." This seems a slight basis for the declaration, which was, in fact, not essential to a decision of the point at issue in the case which was whether a provision of the penal code of Alaska imposing certain license taxes was repugnant to the clause of the United States Constitution requiring that duties, imposts and excises shall be uniform throughout the United States.

In the later case of *Rasmussen v. United States*<sup>9</sup> it was held that, as regards the application of certain constitutional provisions to the territory of Alaska, the question whether or not it was an organized territory was immaterial, the essential point being whether it had or had not been "incorporated" into the United States. The court held that Alaska had been incorporated. Mr. Justice Brown, however, in a separate concurring opinion, declared the view that, by "organizing" a territory Congress necessarily implies that it regards the territory as incorporated into the United States. "What," he asks, "is an organized as distinguished from an incorporated territory? Does not the acceptance of the cession of territory and the appointment of a civil governor mark the incorporation of the territory as territory of the United States?"<sup>10</sup>

#### § 248. Constitutionality of Territorial Governments.

The constitutionality of the legislation referred to in the preceding sections has never been seriously questioned.<sup>11</sup>

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<sup>8</sup> 23 Stat. at L. 24.

<sup>9</sup> 197 U. S. 516.

<sup>10</sup> It will be remembered that Mr. Justice Brown considered the distinction between incorporated and unincorporated territories constitutionally unnecessary and even mischievous because confusing.

<sup>11</sup> In the early case of *Sere v. Pitot* (6 Cr. 332), decided in 1810, in its first reference to the power, the Supreme Court, without dissent, speaking through Marshall, after declaring the right of the United States to acquire and govern territory said: "Accordingly we find Congress possessing and exercising the absolute and undisputed right of governing and legislating for the Territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

In *American Insurance Co. v. Canter* (1 Pet. 511), decided in 1828, Marshall, after referring to certain provisions of the treaty by which Florida was acquired from Spain, said: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. . . . They do not, however, participate in political power; they do not share in the government, till Florida shall become a State."

In *Snow v. United States* (18 Wall. 317), decided in 1873, the court said: "The government of the Territories of the United States belongs primarily to Congress; and secondarily to such agencies as Congress may establish for that purpose. During the



The plenary character of the legislative power of Congress in this respect is perhaps best stated in *National Bank v. County of Yankton*.<sup>12</sup> Chief Justice Waite, speaking for the court, said: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." Again, in *Murphy v. Ramsay*<sup>13</sup> the court declared: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be ad-

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term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. It is, indeed, the practice of the Government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt."

In the *Dred Scott* case, Taney, though otherwise emphasizing the limitations upon the power of Congress over Territories, conceded that it has a full discretion with reference to the form of governments it may establish over them. He said: "The power to acquire, necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be the best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and the situation in the Territory. In some cases a government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a State; and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner, until it is fitted to be a State."

<sup>12</sup> 101 U. S. 129.

<sup>13</sup> 114 U. S. 15.

mitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States, and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved."

In *Late Corporation, etc., v. United States*<sup>14</sup> the foregoing decisions were cited and unqualifiedly approved.

There is, in fact, an unbroken line of judicial *dicta* upon this point. Even in the *Dred Scott* case, Taney, who would limit the legislative power of Congress over the Territories in other respects, did not deny that as to the form of government to be established over them, Congress has full discretion. Upon this point the preceding opinions which we have quoted were cited by Taney with approval. He did, indeed, say that no power is given by the Constitution to the Federal Government to acquire territory to hold and maintain permanently as colonies, but admitted, as we have seen, that territory may be annexed which is not immediately ready for statehood, and that, until so fitted, the form of its government must necessarily lie in the discretion of Congress.

In the opinion rendered by Justices White, Shiras, and McKenna and concurred in by Gray, in *Downes v. Bidwell*<sup>15</sup> it was intimated that there may be unexpressed but inherent limitations upon the discretion of Congress in the establishment of governments for the Territories. After calling attention, in illustration of the plenitude of power of Congress in this respect, to the fact that Congress has established in the District of Columbia "a local government totally devoid of local representation in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative, in effect acting as the local legislature, the opinion nevertheless went on to say: "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any or all of the Territories, by which that body is restrained from the widest latitude of discretion,

<sup>14</sup> 136 U. S. 1.

<sup>15</sup> 182 U. S. 244.

it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free governments which cannot be with impunity transcended [*Church of Jesus Christ v. United States*, 136 U. S. 1]. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

It is difficult for the author to follow the reasoning of the Justices as set forth in these sentences. It would seem that there is some confusion of the authority of Congress to create governments for the Territory, and its power to legislate regarding the private civil rights of their inhabitants. The reference to the Mormon Church case shows this, for that case had nothing to do with the governing powers of Congress. These governing powers are absolute, without any express, implied, or "inherent" limitations.

#### § 249. Territorial Governments Are Congressional Governments.

The governments established in the Territories by Congress act as agencies of Congress, in the same sense that an administrative board acts as the agent of the law-making body that creates it. As such congressional agencies, the Territorial governments are not considered to be parts of the General Government established or directly provided for by the Constitution. This point was early determined in *American Insurance Co. v. Canter*.<sup>16</sup> In this case the point was raised that the Territorial judges in Florida had been appointed for terms of but four years, whereas the Constitution provides that the judges of both the Supreme and inferior Federal courts shall hold office during good behavior. In sustaining the validity of the Territorial law in this matter, Marshall said: "These courts . . . are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but was conferred by Congress in execution of those general powers which that body possesses over the Territories of the United States."

In *Benner v. Porter* <sup>17</sup> the court said with reference to Territorial governments: "They are legislative governments, and their courts legislative

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<sup>16</sup> 1 Pet. 511.

<sup>17</sup> 9 How. 235.

courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine."<sup>18</sup>

In *United States v. Pridgeon*<sup>19</sup> it was held that the courts provided for the Territory of Oklahoma could be and had been authorized by Congress to sit as Territorial courts to administer the laws of the Territory, and as courts of the United States to administer the laws of the United States.

In *American Insurance Co. v. Canter*<sup>20</sup> and in *Re Cooper*<sup>21</sup> it was held that the Territorial courts may be granted admiralty jurisdiction. Also, though not "inferior" courts within the meaning of Section 1, of Article III of the Constitution, an appeal may be granted from them to the Supreme Court. In *United States v. Coe*<sup>22</sup> the court said: "As wherever the United States exercises the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may in accordance with the Constitution be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government. There has never been any question in regard to this as applied to territorial courts, and no reason can be perceived for applying a different rule to the adjudications of the court of private land claims over property in the Territories."

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<sup>18</sup> In *Clinton v. Englebrecht* (13 Wall. 434), the court said: "There is no Supreme Court of the United States, nor is there any district court of the United States in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution of the General Government. The courts are the legislative courts of the Territories, created in virtue of that clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

To the same effect are the cases *Hornbuckle v. Toombs* (18 Wall. 648); *Good v. Martin* (95 U. S. 90); *Reynolds v. United States* (98 U. S. 145); *The City of Panama*, (101 U. S. 453); *McAllister v. United States* (141 U. S. 174); *United States v. Pridgeon* (153 U. S. 48), and *United States v. Coe* (155 U. S. 76).

<sup>19</sup> 153 U. S. 48.

<sup>20</sup> 1 Pet. 511.

<sup>21</sup> 143 U. S. 472.

<sup>22</sup> 155 U. S. 76.

## CHAPTER XXVII

### THE DISTRICT OF COLUMBIA: PLACES PURCHASED BY UNITED STATES

#### § 250. The Government of the District of Columbia.

The constitutional status of the district used as the seat of the Federal Government is almost the same as that of the Territories. Clause 17 of Section VIII of Article I of the Constitution empowers Congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States."

In *Loughborough v. Blake* <sup>1</sup> Marshall declared the District of Columbia to be a part of the "United States" within the narrower constitutional meaning of the term,<sup>2</sup> and as such Congress to be restrained, when legislating for it, by the limitations applicable generally to the United States as thus narrowly defined.<sup>3</sup>

This dictum of Marshall's was, however, later declared erroneous by the Supreme Court in *Downes v. Bidwill*.<sup>3</sup> Mr. Justice Brown held, in that case, that the District was entitled to the protection imposed by such constitutional limitations upon the legislative powers of Congress by reason of the fact that its area had been a part of a State, which was entitled to such immunity from congressional control, and that such immunity was not, and could not be, lost by the cession of the District to the United States.

In *Loughborough v. Blake* the question was as to the power of Congress under a general law to levy and collect a direct tax in the District of Columbia. In denial of this power it was argued that while Congress might, when acting simply as a local legislature, levy and collect such a tax for local purposes in the same manner that the legislature of a State might do, it might not do so under its general taxing power, for the reason that the Constitution provides that "Representatives and direct taxes shall be apportioned among the States which may be included within the Union, according to their respective numbers." To this, however, Marshall replied: "The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation

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<sup>1</sup> 5 Wh. 317.

<sup>2</sup> See, *post*, for the discussion of this term in the Insular cases.

<sup>3</sup> 182 U. S. 244.

any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms." The grant to Congress of the "power to levy and collect taxes, duties, imposts and excises," is, Marshall declared, a general grant without limitation as to place. "If this could be doubted," he continued, "the doubt is removed by the subsequent words which modify the grant. These words are 'but all duties, imposts and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to levy and collect duties, imposts, and excises, may be exercised and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the Territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principle of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other."

Marshall, however, went on to argue that while the general grant of power to lay and collect taxes is a general one and, therefore, authorizes Congress to include the District and Territories within the operation of a general direct tax (in which case it must be apportioned in such District and Territories according to their respective populations) it did not follow that such areas must be included within the operation of such laws. "If . . . a direct tax be laid at all, it must be laid on every State conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories."

In *Hepburn v. Ellzey* <sup>4</sup> it was held by Marshall in a very brief opinion that a resident of the District of Columbia could not maintain an action in a Federal Circuit Court on the ground that he was a citizen of another State, for the reason that the District was not a State. The Chief Justice said:

"On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, 'a State' according to the definition of writers on general law.

"This is true. But as the act of Congress obviously uses the word 'State' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the mem-

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<sup>4</sup> 2 Cr. 445. See also *Ex parte Massachusetts* (197 U. S. 482).

bers of the American confederacy only are the States contemplated in the Constitution.

"The house of representatives is to be composed of members chosen by the people of the several States: and each State shall have at least one representative.

"The senate of the United States shall be composed of two senators from each State.

"Each State shall appoint for the election of the executive, a number of electors equal to its whole number of senators and representatives.

"These clauses show that the word 'State' is used in the constitution as designating a member of the union, and excluded from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

"Other passages from the constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

"It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration."

The District of Columbia though not a "State" in the sense in which that word is used in the constitutional clause which gives to the Federal courts jurisdiction in suits between citizens of different States,<sup>5</sup> is declared in *DeGeofroy v. Riggs*,<sup>6</sup> to be a State within the meaning of a treaty granting certain rights to aliens within the "States of the Union." That the District is a part of the United States internationally viewed was declared in *Loughborough v. Blake*, and this *dictum* has never been questioned.

But with reference to the form of government to be given the District, the authority of Congress is as absolute as we have seen it to be with regard to the Territories, except, as will presently appear, with regard to the creation in the District of Columbia of a body with legislative power, i. e., with more than ordinance-promulgating authority. "The Congress of the United States being empowered by the Constitution 'to exercise exclusive jurisdiction in all cases whatever,' over the seat of the National Government, has the entire control over the District of Columbia for

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<sup>5</sup> *Hepburn v. Ellzey* (2 Cr. 445); *Hooe v. Jamieson* (166 U. S. 395).

<sup>6</sup> 133 U. S. 258.

every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within a State.”<sup>7</sup>

The Constitution provides that Congress shall “exercise exclusive legislation in all cases whatsoever” over such district as shall, by cession of particular States, become the seat of government. To the author it would seem that the intent of those who framed this provision was that by it Congress should be granted authority exclusive of the State or States by which the territory of the District might be ceded. Congress has, however, since the beginning, acted upon the assumption that by this provision it is intended that, while ordinary municipal powers, such as are granted to a city, may be delegated to the local governing body in the District, it may not delegate to such body the general legislative powers possessed by a State of the Union; that, in other words, the legislative authority over the District being vested by the Constitution “exclusively” in Congress, it may not by delegation be exercised by any other body. Thus, if we divide the governing powers in the United States into national, State and local, it has been held necessary that, as regards the District the first two must be exercised by Congress itself.

It cannot be said that the Supreme Court has passed squarely upon this point, but by various *dicta* this doctrine has been declared. In *Stoutenburgh v. Hennick*,<sup>8</sup> the court, after saying that the creation of municipalities exercising local self-government does not violate the rule that legislative powers may not be delegated, went on to say: “But as the repository of the legislative powers of the United States, Congress in creating the District of Columbia ‘a body corporate for municipal purposes’ could only authorize it to exercise municipal powers.” Strictly speaking, this *dictum* was *obiter* as regards the delegation to the local body of local legislative powers such as are exercised by the States, within their several State limits, for the point actually determined in the case was the constitutional inability of Congress to give to the district government authority to legislate with reference to a matter of national concern, namely, interstate commerce. It is believed, however, that the long-continued legislative construction which has been consistently followed, reinforced by this and other judicial *dicta*,<sup>9</sup> makes very improbable the acceptance of a different doctrine.

When legislating for the District, and the same is true of the Territories, Congress acts not only as a local legislature in the sense that a State legislature acts as the local legislature for that State, but also as a National Legislature. Whence it follows that the laws thus enacted, though of course only applicable to the local areas, the District or the Territories,

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<sup>7</sup> *Capital Traction Co. v. Hof* (174 U. S. 1).

<sup>8</sup> 129 U. S. 141.

<sup>9</sup> *Cf. Cohens v. Virginia* (6 Wh. 264).



especially referred to, are yet national acts in that, so far as is necessary for their enforcement, they have a validity throughout the Union. This doctrine is clearly laid down by Marshall in *Cohens v. Virginia*,<sup>10</sup> and has not since been questioned. In that case the court said:

"The clause which gives exclusive jurisdiction is, unquestionably, a part of the Constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them. . . . The power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escapes out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carried with it all those incidental powers which are necessary to its complete and effectual execution."

The courts of the District of Columbia, as distinguished from those of the Territories, have been declared by Congress to be Federal courts of the United States. By Section 61 of the Code of Law for the District<sup>11</sup> it was declared of the Supreme Court of the District that it "shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States."<sup>12</sup>

In *Federal Trade Commission v. Claire Furnace Co.*<sup>13</sup> it was held that

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<sup>10</sup> 6 Wh. 264.

<sup>11</sup> 31 Stat. at L. 1199.

<sup>12</sup> See also Sections 62 and 84 of the code of the District of Columbia of 1924.

<sup>13</sup> 274 U. S. 160.

the Court of Appeals of the District had the same jurisdiction to enforce orders of the Federal Trade Commission relating to matters within the District as is conferred by the Federal Trade Commission Act on the United States Circuit Courts of Appeal. In the course of its opinion the court said: "It has been the evident intention of Congress that laws generally applicable to enforcement of what may be called Federal law in the United States generally should have the same force and effect within the District of Columbia as elsewhere. For this purpose the courts of the District of Columbia are Federal courts of the United States.<sup>14</sup> They are part of the Federal judicial system."<sup>15</sup>

### § 251. Places Purchased.

The same clause of the Constitution which grants to Congress exclusive jurisdiction over the district to be selected for the seat of the National Government, authorizes Congress "to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The Federal ownership of such tracts within the States is to be sharply distinguished from political jurisdiction over them. This latter, as the Constitution provides, may be obtained only when the districts have been acquired with the consent of the States in which they are situated.

The language of Clause 17 would seem to indicate that the framers of the Constitution intended that the General Government should or could acquire lands within the States only by purchase and with the consent of the States. In practice, however, this consent has not always been obtained, or been deemed necessary. But, in such cases, the political jurisdiction of the State is not ousted. In *Fort Leavenworth R. R. Co. v. Lowe*<sup>16</sup> the court said: "The consent of the States to the purchase of lands within them for the special purposes named [in Clause 17] is . . . essential under the Constitution, to the transfer to the General Government with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals."

The General Government is able to acquire lands within the States by the exercise of the right of eminent domain, a right which it may employ

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<sup>14</sup> Citing *Keller v. Potomac Electric Co.* (261 U. S. 428).

<sup>15</sup> Citing *Benson v. Henkel* (198 U. S. 1).

<sup>16</sup> 114 U. S. 525.

when "necessary and proper" to the exercise of any of its expressly given powers.<sup>17</sup> When thus obtained, the lands, like those acquired by direct purchase and without the consent of the States, remain subject to the general political jurisdiction of the States in which they are located. As property of the United States they are not, however, subject to taxation by the States,<sup>18</sup> nor, when used for a public governmental purpose as, for example, a military barracks, a post-office, a hospital, or a penitentiary, may State jurisdiction be exercised in such a way as to interfere with such use.<sup>19</sup>

In *Ohio River Contract Co. v. Gordon*<sup>20</sup> it was held that State courts are not deprived of jurisdiction to entertain suits for personal damages by reason of the fact that the injuries occur upon lands within the exclusive jurisdiction of the United States.

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<sup>17</sup> *Kohl v. United States* (91 U. S. 367).

<sup>18</sup> *Van Brocklin v. Tennessee* (117 U. S. 151).

<sup>19</sup> See *Fort Leavenworth R. R. Co. v. Lowe* (114 U. S. 525).

<sup>20</sup> 244 U. S. 68.

## CHAPTER XXVIII

### MILITARY AND PRESIDENTIAL GOVERNMENT OF ACQUIRED TERRITORY

#### § 252. Conquest or Military Occupation Does Not Operate to Annex Territory.

Mere conquest, that is, the occupation by military force of foreign territory, is not sufficient to annex such territory to the State whose forces are in possession of it. However, for the time being, as a belligerent right, and from necessity, the entire control of this area, its government, and the lives and property of its inhabitants are in the hands of the victorious power. The inhabitants are no longer protected by the State whose forces have been ousted, and for the time being owe no allegiance to it, but owe an allegiance to the State which is in possession.

In the quite early case of *United States v. Rice*<sup>1</sup> the doctrine of military possession was discussed with reference to the port of Castine, Maine, which, for a time during the War of 1812, was in possession of the British military forces, but, after peace was restored, was returned to the United States. The court said: "It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. . . . By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary, allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of

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<sup>1</sup> 4 Wh. 246.

authority by the United States, did not, and could not, change the character of the previous transactions."

In *Fleming v. Page*<sup>2</sup> the question arose whether duties levied upon goods entering the United States from the port of Tampico, at the time it was in the military possession of the United States, were properly levied under the act of Congress which imposed duties upon goods imported from a foreign country. Taney, who rendered the opinion of the court, said: "The Mexican authorities had been driven out, or had submitted to our army and navy and the country was in the exclusive and firm possession of the United States and governed by the military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. The country in question had been conquered in war. But the genius and character of our institutions are peaceful and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the General Government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's territory. The United States, it is true, may enlarge its boundaries by conquest or treaty and may demand the cession of territory as a condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expense of the war; but this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and power are purely military. . . . He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of this Union nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power. It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as

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<sup>2</sup> 9 How. 603.

the territory included in our established boundaries. But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made."

At first it may appear that the doctrine declared in *Fleming v. Page* is not in harmony with that uttered in *United States v. Rice*; for in the latter case it was held that mere military occupation was not sufficient to annex the territory occupied by the United States; whereas, in the earlier case, it was declared that military occupation by the force of another state did operate to render the port foreign to the United States. If these two decisions had been given by an international tribunal, or had had reference to the status of the territories received internationally, they undoubtedly would have been inharmonious. For, looked at from the international side, a country belongs to that power which is in effective control of it. Therefore, thus viewed, Castine belonged to Great Britain while its military forces were in paramount control of it. In like manner, Tampico, viewed internationally, was a port of the United States, and other States would have held the United States responsible for anything that might have occurred there while it was in possession. But when, as was the case both in *United States v. Rice* and *Fleming v. Page*, the question was purely one of domestic municipal law, it was within the province of the Supreme Court to determine in each case the status of the territory con-

cerned according to the peculiar municipal or constitutional law which it was interpreting and applying. In other words, in the *Fleming v. Page* case the Supreme Court would not have been justified in declaring that Tampico did not, during American occupancy, belong to the United States in an international sense; whereas it was justified in holding that from the viewpoint of American constitutional law it was not a part of the United States, any more than, for example, was Cuba during the time of its administration by American authorities.<sup>3</sup>

In *Neely v. Henkel*,<sup>4</sup> with reference to the status of Cuba, during the American occupation, the Supreme Court said: "Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. The result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba. It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to

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<sup>3</sup> In *De Lima v. Bidwell* (182 U. S. 1) the court said: "It is not intended to intimate that the cases of *United States v. Rice* and *Fleming v. Page* are not harmonious. In fact they are perfectly consistent with each other. In the first case it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the *Rice* case to impose a duty upon goods which might already have paid a duty to the British commander. It would have been equally unjust in the *Fleming* case to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States."

This reasoning, based simply on principles of justice or expediency, hardly seems convincing, but that the two cases are not necessarily inharmonious has been shown above in the text.

The dissenting justices in the *De Lima* case, however, held that the two cases were harmonious, but not upon the grounds stated by the majority. That which, in their opinion, justified the court in holding in the *Fleming* case that Tampico was not within the scope of the United States tariff laws was because Congress had not so legislated as to bring it within a collection district or to establish a custom house there. "At *Castine*," they said, "the instrumentalities of the custom laws had been divested, at Tampico they had not been invested."

<sup>4</sup> 180 U. S. 109.

whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

In *Dooley v. United States*,<sup>5</sup> one of the "Insular Cases" decided in 1901, the doctrine of *Fleming v. Page* was applied in fixing the status of Porto Rico while under the military government of the United States, but prior to the ratification of the treaty of peace ceding the island to the United States. The court said: "During this period the United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandise imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into the island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws, is established by the case of *Fleming v. Page*."<sup>6</sup>

### § 253. Authority of De Facto Governments.

The government established and maintained by one State in military possession of territory of another, is, of course, a *de facto* one, but *de facto* in a somewhat different sense from that of an insurrectionary government established as a result of a rebellion or civil war. But in either case the authority of the *de facto* government is to an extent at least recognized by the *de jure* government. This is adverted to by the Supreme Court in *Thorington v. Smith*<sup>7</sup> in passing upon the status of the Confederate Government established during the Civil War.<sup>8</sup>

<sup>5</sup> 182 U. S. 222.

<sup>6</sup> President McKinley was criticized, and with justice, for issuing on December 21, 1898, that is, on a date prior to the ratification of the treaty with Spain ceding the Philippines, an executive order in which he declared: "With the signature of the treaty of peace between the United States and Spain by their respective plenipotentiaries at Paris on the 10th instant, and as the result of the victories of American arms, the future control, disposition, and government of the Philippine Islands are ceded to the United States. In fulfilment of the rights of sovereignty thus acquired, etc." The treaty was not ratified by the treaty-making power of the United States until the following February, and did not go into effect until April 11, 1899.

<sup>7</sup> 8 Wall. 1.

<sup>8</sup> The court said: "There are several degrees of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored. It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made with



**§ 254. Status of Conquered Domestic Territory.**

In *New Orleans v. New York Mail Steamship Co.*<sup>9</sup> was considered the status of territory of the Southern Confederacy which had been conquered by the Federal forces. The court held that the Federal forces in possession might exercise the same absolute authority as in the case of territory conquered from a foreign State.<sup>10</sup>

it by any civilized State. No obligations of a national character were created by it, binding after its dissolution, on the States which it represented, or on the National Government. From a very early period of the Civil War to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the Territories, and against the rightful authority of an established and lawful government; and (2) that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force. One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. . . . A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming v. Page* (9 How. 603), that although Tampico did not become a port of the United States in consequence of that occupation, still, having come together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part. The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible."

<sup>9</sup> 20 Wall. 387.

<sup>10</sup> "Although the City of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore

**§ 255. Presidential Governments.**

In 1846, during the war with Mexico, the United States military forces took possession of Upper California. In 1847 the President as Commander-in-Chief of the army and navy authorized the establishment, by the military commanders, of a civil and military government for the conquered territory. This was done. In *Cross v. Harrison*<sup>11</sup> the question was raised whether this government might lawfully continue its existence after the date of the treaty of peace by which the territory was formally annexed to the United States, and until Congress had legislated for its government. In deciding this in the affirmative, the court said: "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the Territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the

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the supremacy of the National Government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country, and had been subjugated in a foreign war. The Prize Cases (2 Black, 635); *Mrs. Alexander's Cotton* (2 Wall. 404); *Mauran v. Ins. Co.* (6 Wall. 1). In such cases the conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject. They have been repeatedly recognized and applied by this court. *Cross v. Harrison* (16 How. 164); *Leitensdorfer v. Webb* (20 How. 176); *The Grapeshot* (9 Wall. 129). In the case last cited the President had, by Proclamation, established in New Orleans a Provisional Court for the State of Louisiana, and defined its jurisdiction. This court held the Proclamation a rightful exercise of the power of the Executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace."

<sup>11</sup> 16 How. 164.

inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress under its powers to admit new States into the Union."

The government maintained by the President over a conquered territory being belligerent, is, as is stated in the paragraph quoted above, absolute in character, according to the general doctrines of international law regarding military occupation: "It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war." <sup>12</sup>

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<sup>12</sup> When, after the capitulation of the Spanish forces in Santiago, Cuba, the military forces of the United States took possession of the eastern part of the province, the President instructed the military commander, *inter alia*, as follows: "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their rights and relations. . . . All persons who either by active aid or by honest submission, co-operate with the United States to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible. Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander-in-chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so. While the rule of conduct of the American commander-in-chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether; to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice. One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and

We have seen from the preceding cases that the power of the President, as Commander-in-Chief of the army and navy, is practically absolute over conquered territory. And also, that this power persists after the formal annexation of the territory in question to the United States and until Congress legislates for its government. It would appear, however, that, during this latter period, the President's power is not as absolute as in the period prior to annexation. Absolute power, according to American constitutional doctrine, is only justified by military necessity, and, therefore, with the cessation of hostilities and the annexation of the territory by which it is brought within the general province of the American doctrine, there spring up certain limitations upon the President's governing power.<sup>13</sup> The extent of these limitations will be discussed in a later chapter dealing with martial and military law, and with the doctrines laid down by the Supreme Court in the "Insular Cases" determining the political status and the civil rights of the inhabitants of the islands acquired in 1898 from Spain.

securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the State may be appropriated to his use, but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or works of science or art is prohibited, save when required by urgent military necessity. Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines or cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army. Private property taken for the use of the army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given. All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation." Moore, *Digest of Int. Law*, VII, § 1143. The order was issued July 18, 1898.

<sup>13</sup> See, for example, the language of the court in *Dooley v. United States* (182 U. S. 222).

## CHAPTER XXIX

### THE ANNEXATION OF TERRITORY BY TREATY

#### § 256. Congressional Action Not Needed to Complete Annexation of Territory Acquired by Treaty.

That, under the treaty-making power provided in the Constitution, a foreign country may be brought under the sovereignty of the United States, and thus, from the viewpoint of international law, become a part of it, is, as we have seen, beyond question. In *De Lima v. Bidwell*,<sup>1</sup> one of the "Insular Cases," decided in 1901, was urged the point, however, that, before such an annexed territory can become "domestic" territory and as such be brought, *ipso facto*, under the operation of the Federal laws generally, an act of Congress to that effect is necessary.

Prior to the *De Lima* case, this question had been several times raised, especially with reference to the immediate applicability of the revenue laws of the United States to annexed territories, but had never been thoroughly discussed, nor had administrative practice and the laws always been harmonious with judicial pronouncements, nor these judicial pronouncements harmonious with one another.

In *Fleming v. Page*,<sup>2</sup> decided in 1850, it was held, as we have seen, that conquest and military occupation of a foreign district did not, *ipso facto*, make that district a part of the United States, and, therefore, that duties were properly levied upon goods imported therefrom into the United States under the act of Congress imposing duties upon imports from foreign countries. Taney, however, in his opinion went further than the facts of the case necessitated, and adverted to the circumstance that the administrative department of the government had, as a rule, continued to treat territory acquired by treaty as foreign until Congress by legislation had extended over it its revenue laws.<sup>3</sup>

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<sup>1</sup> 182 U. S. 1.

<sup>2</sup> 9 How. 603.

<sup>3</sup> He said: "This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, although Florida had by cession, actually become a part of the United States, and was in our

§ 257. *Cross v. Harrison.*

In *Cross v. Harrison*,<sup>4</sup> however, decided in 1853, it was held by a unanimous court, including Chief Justice Taney himself, that, by the ratification of the treaty of 1848 between Mexico and the United States, California became a part of the United States, and the tariff laws of the United States then in force *ipso facto* applicable to it.

The treaty which fixed the boundary between Mexico and the United States was ratified May 30, 1848. The *de facto* military government continued in force after this date, but, after official notice of the treaty was received, the commander in charge ceased collecting the military duties which he had been imposing, and substituted therefor duties imposed by the revenue laws of the United States. He reported this to the President and his action was approved. By a letter of October 9, 1848, the Secretary of War instructed the commander that "the government *de facto* can of course exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the States and Territories of our Union. For this reason no import duties can be levied in California on articles of growth, produce, or manufacture of any State or Territory of the United States, and no such duties can be imposed in any part of the Union on the productions of California; nor can duties be charged on such foreign productions as have already paid duties in any port of the United States."<sup>5</sup>

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possession, yet under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly-acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress. The principle thus adopted and acted upon by the Executive Department of the government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States."

<sup>4</sup> 16 How. 164.

<sup>5</sup> The Secretary of the Treasury also at this time issued a circular (October 7, 1848), in which he declared: "By the treaty with Mexico, California is annexed to this Republic,

Acting in accordance with these instructions, the existing tariff and navigation laws of the United States were enforced by the *de facto* government. In *Cross v. Harrison* the legality of this action was sustained. In passing upon the status and power of the government after the treaty of peace, the court said: "It was urged that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods, or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied that collection districts and ports of entry were no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations, that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere within its jurisdiction is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nations. Upon this principle, the plaintiffs had no right to trade with California with foreign goods, excepting from the permission given by the United States under the civil govern-

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and the Constitution of the United States is extended over that Territory and is in full force throughout its limits." "Congress also," he added, "by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several particulars the laws of the United States. Under these circumstances the following instructions are issued by this Department:

"First. All articles of the growth, produce, or manufacture of California shipped therefrom at any time since the 30th of May last are entitled to admission free of duty into all ports of the United States.

"Second. All articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California.

"Third. Although the Constitution of the United States extends to California, and Congress has recognized it by law as a part of the Union and legislated over it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this Department may be unable to collect the duties accruing on importations from foreign countries into California, yet if foreign dutiable goods should be introduced there and shipped thence to any port or place of the United States they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without payment of duties."

ment and war tariff which had been established there. And when the country was ceded as a conquest, by a Treaty of Peace, no larger liberty to trade resulted. By the ratifications of the Treaty, California became a part of the United States. And as there is nothing differently stipulated in the Treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage. . . . The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there is nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation 'to take care that the laws be faithfully executed.' . . . In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a ceded Territory until Congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until Congress had acted."

#### § 258. *De Lima v. Bidwell.*

In *De Lima v. Bidwell*,<sup>6</sup> with reference to the island of Porto Rico, the court held itself governed by the doctrine declared in *Cross v. Harrison*. It agreed with the declaration in *Fleming v. Page* that by mere military occupation a port did not become "domestic," and as such subject to the general revenue laws of the United States; but with reference to the *dictum* of Taney that it remained foreign because the United States customs laws had not been formally extended over it, the majority in their opinion observed: "While we see no reason to doubt the conclusion of the court that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a custom-house there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an act of Congress, with authority to grant clearances to ports within the United

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<sup>6</sup> 182 U. S. 1.



States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port."<sup>7</sup>

After quoting at length, and with approval, from *Cross v. Harrison*, the majority opinion continued: "The opinion, which is quite a long one, establishes the three following propositions: (1) That under the war power the military governor of California was authorized to prescribe a scale of duties upon importations from foreign countries to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace. (2) That after such ratification duties were legally exacted under the tariff laws of the United States, which took effect immediately. (3) That the civil government established in California continued, from the necessities of the case, until Congress provided a Territorial government. It will be seen that the three propositions involve a recognition of the fact that California became domestic territory immediately upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California. The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted and a collector is appointed was distinctly repudiated with the apparent acquiescence of Chief Justice Taney, who wrote the opinion in *Fleming v. Page*, and still remained the Chief Justice of the court. The opinion does not involve directly the question at issue in this case; whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in *Cross v. Harrison* were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty would not be considered as imported from a foreign country."

The court then examined the practice and rulings of the executive department of the United States with respect to the status of newly acquired territories prior to their status being settled by acts of Congress and found these rulings and practice, with the single exception of an order of Secretary of State Gallatin in 1803, to be in conformity with the position of the court in *Cross v. Harrison*.

As showing the construction put upon this question by the legislative department, the court quoted from section 2 of the Foraker Act establishing civil government in Porto Rico, which "makes a distinction between foreign countries and Porto Rico, by enacting that the same duties shall be paid upon 'all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries.'"

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<sup>7</sup> See *ante*, § 252, for manner in which the court harmonized the doctrine stated in *U. S. v. Rice* with that declared in *Fleming v. Page*.

The opinion, then, summing up the precedents, said: "From this résumé of the decisions of this court, the instructions of the executive department, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the *dictum* in *Fleming v. Page* (practically overruled in *Cross v. Harrison*), for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient as was held in *Fleming v. Page*; nor is a treaty ceding such territory sufficient without a surrender of possession. *Keene v. M'Donough* (8 Pet. 308); *Pollard v. Kibbe* (14 Pet. 353); *Hallett v. Doe ex dem. Hunt* (7 Ala. 899); *The Fama* (5 C. Rob. 106). The practice of the executive departments, thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *United States v. Johnston* (124 U. S. 236) and other cases cited."

The court then went on to declare that even were the question presented as an original one, it would be irresistibly impelled to the conclusion which the precedents had furnished. This result, it was argued, is deducible from the fact that by the Constitution treaties equally with acts of Congress are declared to be the supreme law of the land, and that one of the ordinary incidents of a treaty is the cession of territory. "The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress."

"The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary, for the adequate administration of a domestic territory, to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no

warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

§ 259. *Dooley v. United States.*

Applying the doctrine of *De Lima v. Bidwell*, the Supreme Court in another of the Insular cases (*Dooley v. United States*),<sup>8</sup> held that though, after the treaty of peace providing for the annexation of Porto Rico, the military government might continue until Congress should provide the island with a civil government (according to the doctrine of *Cross v. Harrison*), the island was no longer "foreign territory" and, therefore, under the then existing revenue laws of the United States, providing for the levying of customs duties on goods imported from foreign countries, that duties might not be levied upon importations into the United States from Porto Rico, nor from the United States into that island. With reference to these latter, the court said: "The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance, it is clear that, while a military commander during the Civil War was in the occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions—in other words, they would not extend beyond the necessities of the case. Thus, in the case of *The Admittance* (*Jecker v. Montgomery*, 13 How. 498) it was held that neither the President nor the military commander could establish a court of prize competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize, although Congress, in the exercise of its general authority in relation to the national courts, would have power

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<sup>8</sup> 182 U. S. 222.

to validate their action. The *Grapeshot*, *sub nom.* The *Grapeshot v. Wallerstein* (9 Wall. 129). So, too, in *Mitchell v. Harmony* (13 How. 115) it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United States, his property would not be liable to seizure by law for such trading, and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is *Mostyn v. Fabrigas* (1 Cowp. 180). In *Raymond v. Thomas* (91 U. S. 712) a special order, by the officer in command of the forces in the State of South Carolina, annulling a decree rendered by a court of chancery in that State, was held to be void. In delivering the opinion Mr. Justice Swayne observed: 'Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.' Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that, until Congress otherwise constitutionally directed, such merchandise was entitled to free entry."

The same four justices dissented in the *Dooley* case that had dissented in the *De Lima* case. The dissent, however, was not with reference to the validity of the duties levied prior to the ratification of the treaty of peace, but only with reference to those exacted after that date. These, the dissentient judges held to have been validly levied. After summarizing their arguments in the *De Lima* case, the dissenting opinion declared that, inasmuch as the court had just decided in *Downes v. Bidwell*<sup>9</sup> that despite the treaty of cession, Porto Rico had remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States, it should not be held that that island ceased to be "foreign" within, at least, the meaning of the tariff laws. "The command in tariff laws," read the opinion, "that import duties should be collected on all merchandise coming from 'foreign countries,' is but a provision that they are to be levied on merchandise arriving from countries which are not a part of the United States, within the meaning of the tariff laws, and which are hence subject to such duties. It must follow that, as long as a locality is in a position where it is subject to the power of Congress to levy an import tariff duty on merchandise coming from that country into the United States, such country must be a foreign country within the meaning of the tariff laws."

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<sup>9</sup> 181 U. S. 244.

In the case *The Diamond Rings*,<sup>10</sup> decided in 1901, the court applied the doctrine of *De Lima v. Bidwell* in fixing the status of the Philippine Islands subsequent to the treaty of cession. The fact that resistance on the part of the natives to the control of the United States continued to be made, was held to be without weight.<sup>11</sup>

**§ 260. Duties of President Prior to Congressional Action.**

The absolute power of Congress to determine the political or governmental rights in annexed territories constitutionally attaches from the moment that they become subject to the sovereignty of the United States. Until Congress exercises this right, however, and provides them with governments and laws, they remain under the control of the Federal executive. This duty devolves upon the President as a result from his general obligation to see that the authority and peace of the United States are everywhere maintained throughout its territorial limits. Thus, after the treaty of peace with Spain in 1899, Porto Rico remained under the control of the President until, by the act of April 12, 1900, known as the "Foraker Act," Congress provided a government for that island. So also it was by an exercise of the same authority that the President, after the same treaty of cession, appointed commissions for the government of the Philippine Islands.

On March 2, 1901, Congress enacted<sup>12</sup> that "All military, civil, and

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<sup>10</sup> 183 U. S. 176.

<sup>11</sup> "The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory, or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, 'cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was a part.' *Thorington v. Smith* (8 Wall. 1). The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation. . . . The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will, did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant. If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected. We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but on the contrary, that it is preserving order and suppressing insurrection in the territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

<sup>12</sup> This was as an amendment to the act making appropriation for the support of the army for the fiscal year ending June 30, 1902.

judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government and for the maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion." This act changed the basis of the Philippine government from a presidential to a congressional one, but did not change its form, the President being given by Congress practically the same powers that before that time he had exercised by virtue of his position as Chief Executive.

By the act of July 1, 1902, entitled "an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Congress not only approved and ratified the previous acts of the Philippine Commission, but went on to define the general lines of action which that body should take, especially with regard to the introduction of local self-government as fast as circumstances should warrant.

The constitutional source of the power of the United States to establish and maintain governments over territories not annexed to itself but in the possession of its military forces is derived both from the expressed power given Congress to declare and wage war, and from the fact of its exclusive authority in all that relates to international affairs, which fact, as we have seen, properly implies the right, in the absence of express prohibitions, to exercise all the powers possessed by sovereign States generally.

From this same source was derived the power of the United States to administer Cuba, and to establish consular courts in oriental countries.

## CHAPTER XXX

### THE DISTINCTION BETWEEN INCORPORATED AND UNINCORPORATED TERRITORIES

#### § 261. Limitations upon Powers of Congress.

The Constitution of the United States contains a number of express limitations upon the Federal legislative power. In addition to those contained in the first ten amendments relative to freedom of religion, speech, and press, the quartering of troops, the right of the people to assemble, to petition, to keep and bear arms, to be secure against unreasonable searches and seizures, to presentment or indictment by jury, to speedy trial, to juries in civil suits, to immunity from excessive bail and fines and cruel and unusual punishments, etc., it is elsewhere provided in the Constitution that all duties, imposts, and excises shall be uniform throughout the United States, that the writ of habeas corpus shall not be suspended, except under certain specified circumstances, that no bill of attainder or *ex post facto* law shall be passed, no capitation or other direct tax laid except in proportion to population, no duty laid upon goods exported from a State, no commercial preferences given to the ports of one State over those of another, no money drawn from the treasury but in consequence of an appropriation made by law, no title of nobility granted, etc. The Thirteenth Amendment also declares that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

When legislating for the States or for their inhabitants these limitations have of course to be observed. The question whether the same is true when Congress is legislating for the Territories and their populations has now to be examined.

In the preceding chapters we have learned the sources whence is derived the power of Congress and of the President to govern annexed Territories. We have learned that by mere military occupation a territory, though for the time being subject to the *de facto* control of the President as Commander-in-Chief of the army and navy, is not annexed to the United States, that is, it does not become permanently subject *de jure* as well as *de facto* to its sovereignty. Only by treaty, or by statute, or by joint resolution of Congress, or by executive acceptance of a cession of sovereignty to the United States, may this annexation be effected.

§ 262. Possible Status of Territories after Annexation.

When thus annexed, however, a district may, according to the recent "Insular Cases," find itself, or by subsequent legislative action be placed, in any one of the following categories.

1. A State of the Union.
2. A "Territory" incorporated into the Union. This Territory may be either "unorganized," or "organized."
3. A Territory appurtenant to, that is, subject to the sovereignty of the United States, but not "incorporated," constitutionally speaking, into the Union of States and Territories for the benefit and protection of whose inhabitants the Constitution was adopted.

§ 263. Unincorporated Territory.

Such "appurtenant," dependent or unincorporated territory is, of course, from the international point of view a part of the United States,<sup>1</sup> but is not, as we shall see, a part thereof in the stricter constitutional sense

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<sup>1</sup> This international use of the term United States is considered in the case of *De Geofroy v. Riggs* (133 U. S. 258), in which the question involved was whether the terms of a treaty giving to citizens of France the right to inherit an interest in real estate in "States of the Union," were applicable to the District of Columbia or only to the States of the Union. The use of the phrase "States of the Union" would upon its face indicate that only the States and not the extra-State areas were concerned, yet the court held that the treaty was to be construed as generally applicable. In its opinion the court said: "This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union.'" Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. (Halleck on Int. Law, Chap. III, Secs. 5, 6, 7.) The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government."

After referring to the case of *De Geofroy v. Riggs*, Justice Brown in the individual opinion which he rendered in *Downes v. Bidwell* (182 U. S. 244), observes: "In dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations, this government is a unit. This is so, not because the Territories comprise a part of the government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the Territories, as well as of the States in their foreign relations."



in which the term is used in the Constitution with reference to certain limitations which that instrument lays upon the legislative powers of Congress.

**§ 264. Distinction between Incorporated and Unincorporated Territories.**

With respect to the form of government that may be established and maintained by Congress over the Territories, there is no distinction between an incorporated and an unincorporated Territory. In either case the congressional authority is absolute. With respect, however, to the civil or private rights of the inhabitants of the Territories, the distinction is very important. For if it be that a Territory is merely appurtenant to, but not "incorporated" into the United States, Congress in its legislation regarding it is bound by but few of the limitations which apply in the case of incorporated Territories, whether organized or unorganized.

This distinction between incorporated and unincorporated Territory is one that was not clearly made until the decision of the Insular cases in 1901. Indeed, prior to that time, there had been a number of decisions by the Supreme Court which indicated that such a distinction did not, and could not, exist according to the Constitutional Law of the United States. There were, however, on the other hand, not a few legislative and administrative precedents which supported such a doctrine; and, by rigorously confining the contrary decisions of the Supreme Court to the facts of the cases in which they were rendered, it was found possible to escape from their control, and to hold that the term "United States," as used in at least some of the clauses of the Constitution, does not, and was not intended to, include all districts subject to the sovereignty of the United States; and that as to such areas not within the limits of the "United States," in this strict constitutional sense, Congress, in the exercise of its legislative powers, is not subject to the limitations which rest upon it when dealing with Territories which are included in the United States.

A review of the decisions of the Supreme Court rendered prior to the Insular Cases, shows that, from the first, the doctrine was held by the court that Congress when legislating upon the civil rights of inhabitants of the Territories is governed by all those express and implied limitations which rest upon it when dealing with the same subjects within the States.<sup>2</sup> The only departures from this doctrine, if departures they be, were: (1) The remark thrown out by Justice Bradley in the *Mormon Church*

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<sup>2</sup> See *Loughborough v. Blake* (5 Wh. 317); *Am. Ins. Co. v. Canter* (1 Pet. 511); *Webster v. Reid* (11 How. 437); *Scott v. Sandford* (19 How. 393); *Reynolds v. U. S.* (98 U. S. 145); *Nat. Bank v. Yankton* (101 U. S. 129); *Murphy v. Ramsay* (114 U. S. 15); *Callan v. Wilson* (127 U. S. 540); *Mormon Church v. U. S.* (136 U. S. 1); *Am. Pub. Co. v. Fisher* (166 U. S. 464); *Springville v. Thomas* (166 U. S. 707); *Thompson v. Utah* (170 U. S. 343).

case <sup>3</sup> that "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and distinct application of its provisions;" and (2) the quotation of this observation by Justice Brewer in *American Publishing Co. v. Fisher* <sup>4</sup> and the statement that "whether the Seventh Amendment of the Constitution of the United States . . . operates *ex proprio vigore* to invalidate this territorial statute may be a matter of dispute." <sup>5</sup>

Opposed, however, to this great weight of judicial opinion, there had been from the beginning, as has been said, a line of administrative and legislative precedents which tended to show a prevailing opinion that the Constitution with its limiting clauses does not immediately extend, *ex proprio vigore*, over all annexed territories, but over only such as have been expressly brought within its sphere of application by being "incorporated" in the Union. And, based upon the fact that this incorporation had certainly taken place with reference to the Territories concerned in the various Supreme Court decisions rendered prior to the Insular cases, an argument was furnished for holding them not controlling in the Insular cases which were concerned with districts that had not been so incorporated. These legislative and administrative precedents it does not fall within the province of this treatise to review. It is sufficient to say that in not a few instances various of the constitutional limitations were not applied in practice in the Territories, and that by specific legislative provisions these limitations were, from time to time, extended over the several Territories acquired by the United States, thus indicating on the part of Congress at least a doubt as to whether the constitutional provisions extended *ex proprio vigore* over the Territories.

Finally, it is to be observed, that, in the Constitution itself, there occur expressions which furnish possible ground for holding that some at least of its limitations were not intended to operate over all Territories that might come under the jurisdiction of, but remain merely appurtenant to, the United States. Thus the Thirteenth Amendment declares that slavery and involuntary servitude shall not exist "within the United States, or any place subject to their jurisdiction." Thus is plainly indicated the possibility that there may be districts subject to but not within the United States. And this point is emphasized when it is remembered that this Amendment was drafted and adopted by substantially the same men who

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<sup>3</sup> 136 U. S. 1.

<sup>4</sup> 166 U. S. 464.

<sup>5</sup> The case of *In re Ross* (140 U. S. 453) properly construed, did not indicate a departure from the rule.

drafted and adopted the Fourteenth and Fifteenth Amendments in which this qualifying phrase does not appear. Again, the Sixth Amendment provides that in criminal trials the accused shall be tried by an impartial jury "of the States and district wherein the crime shall have been committed." <sup>6</sup>

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<sup>6</sup> In *United States v. Dawson* (15 How. 467), the opinion declared: "But it will be seen from the words of this amendment that it applies only to the case of offences committed within the limits of a State. . . . The language of the Amendment is too particular and specific to leave any doubt about it." In *Cook v. United States* (138 U. S. 157), the court said: "That amendment has reference only to offences against the United States committed within a State" (citing *United States v. Dawson*). Yet in *Reynolds v. United States* (98 U. S. 145), the court declared specifically that the Amendment was applicable to the Territory of Utah.

## CHAPTER XXXI

### THE INSULAR CASES

#### § 265. *Downes v. Bidwell*.

As a result of the Spanish-American War the United States came into possession of territories over which, because of their location, their economic and industrial conditions, and especially the character of their populations, it was deemed expedient to give to the Executive or to Congress the freest possible discretion with reference not only to the manner in which they should be governed, but to the civil rights that should be granted their inhabitants. The question whether, in dealing with these new insular possessions, Congress should be held subject to all those constitutional limitations which apply when dealing with civil rights in the States or in the then existing Territories, thus became a most important one.

The form in which this question arose for judicial determination was as to the constitutionality of that clause of the Foraker Act establishing civil "congressional" government in Porto Rico, which provided a scale of customs duties to be paid upon goods brought into the ports of the United States from the island. This necessarily involved an answer to the question whether the provision of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States" applied *ex proprio vigore* to Porto Rico, or whether, having never been formally "incorporated" by Congress into the United States either expressly or by implication, the island was not a part of the "United States" within the meaning of the term as used in the constitutional clause just quoted.

In *Downes v. Bidwell*<sup>1</sup> five of the nine justices of the Supreme Court concurred in holding that, though by the treaty of cession the island of Porto Rico came under the sovereignty of the United States, and when viewed from the standpoint of all other nations became a part of the United States, it did not, when looked at from the viewpoint of its own public law, become a part of the "United States" as that term is used in the Constitution.

Four of these five justices were able to reach this conclusion: First, by making a sharp distinction between "incorporated" and "unincorporated" Territories; Second, by holding that the treaty-making power though able to annex Territories to the United States, that is, bring them under its sovereignty, internationally speaking, is not competent to incorporate such

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<sup>1</sup> 182 U. S. 244.

areas in the United States, but that for this purpose the express or implied consent of Congress is necessary; and Third, that Congress in legislating for unincorporated Territories is not subject to many of the limitations which apply when it is legislating for the States and incorporated Territories.

It will be observed that so far as the general limitations upon the legislative powers of Congress are concerned, these four justices placed the States and the incorporated Territories in the same class. Only the unincorporated Territories were by them excluded from the protection of such limitations as, for example, that Federal tax laws shall be uniform throughout the United States. The fifth justice, Brown, who concurred with these four, did not, as we shall see, make any distinction between incorporated and unincorporated Territories, but excluded them all from the term "United States," and from the protection of all but the most fundamental of the constitutional limitations upon the power of Congress. The constitutional rights which these limitations create, he asserted, do not belong to the citizens of any Territories until by act of Congress they have been extended to them. Thus, while the four justices divided the domains of the United States into the three classes of States, Incorporated Territories, and Unincorporated Territories; Justice Brown recognized only two categories, States and Territories.

The reasoning of the four justices is as follows:<sup>2</sup> At the beginning very proper care is taken to point out that the question is not as to whether the Constitution is to control in the premises, but as to which of its provisions are applicable. "Every function of the government being . . . derived from the Constitution," says the opinion, "it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. Hence it is that whenever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. As Congress in governing the Territories is subject to the Constitution, it results that all the limitations of the Constitution, which are applicable to Congress in exercising this authority, necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the Territories is also controlling therein. . . . In the case of the Territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable. . . . And the determination of what particular provision of the Constitution is ap-

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<sup>2</sup> These were the same justices who dissented from the judgment of the court in *De Lima v. Bidwell* that by the treaty of annexation Porto Rico at once ceased to be "foreign territory" within the meaning of the Federal tariff laws.

plicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States."

Some of the limitations created by the Constitution, the opinion recognized, are of such "general and fundamental character or so absolutely laid down" as to restrain Congress in whatever capacity it may be acting—whether as a general legislature for all the regions and peoples subject to United States sovereignty, or only as a local legislature for the Territories. "Albeit," the opinion declared, "as a general rule, the status of a particular Territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to form and manner in which a conceded power may be exercised, but which are absolute denials of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot under any circumstances be transcended, because of the complete absence of power." The opinion did not attempt, however, to enumerate any of those absolute prohibitions of power, though it did later describe them as those made "in favor of human liberty."

With reference to the special point at issue, the opinion said: "There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifoldly more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause. The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation—for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress—but is whether the particular tax in question was levied in

such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?"

The opinion then examined: First, whether the United States has the constitutional power to acquire territory and hold it as appurtenant and dependent territory without "incorporating" it in itself in a constitutional sense; and, Second, whether, if it has the power, it had done so in the case of Porto Rico.<sup>3</sup>

The power to acquire and hold territory in whatever constitutional status it sees fit, is, said the opinion, an inherent power possessed by all sovereign States (citing numerous international law writers). This power is possessed by the United States. Its power to acquire territory is conceded. But, the opinion continued: "To concede to the United States the right to acquire, and to strip it of all power to protect the birthright of its citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident to the right to acquire."

The assertion that it is contrary to the spirit of the Constitution to hold territories without incorporating them as integral parts of the United States this opinion declares to be based upon political and not upon judicial considerations, there being no particular provision of the Constitution upon the subject. "Conceding," said the opinion, "that the conception upon which the Constitution proceeds is that no territory, as a general rule, shall be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is entirely a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or real dangers."<sup>4</sup>

Not only, then, has the United States the power to acquire and hold "appurtenant" territory, but, the opinion continued, this is the only status which may be given to annexed territory by the treaty-making power. For incorporation the consent of Congress is required. "It seems," the opinion continued, "impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United

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<sup>3</sup> The decision as to Porto Rico would of course conclude the status of the other insular possessions obtained in 1899 from Spain.

<sup>4</sup> This would hardly seem to meet the point, which is not as to the power to hold districts for an indefinite length of time in a territorial condition, but as to the power to annex territory without "incorporating" it in the United States.

Though declared to be a political question, the necessity of such a power is argued at length by these justices.

States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted, vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

"And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue,—bills for which, by the Constitution, must originate in the House of Representatives,—and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and



this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play."

As is later indicated, however, where the treaty of annexation provides for incorporation, the consent of Congress to such incorporation may be implied from legislation that recognizes this status as having been obtained. But where a treaty of cession does not expressly provide for incorporation, and still more, where it expressly provides against it, a more formal congressional action would seem to be necessary.

The opinion then proceeded to maintain that at the time the Constitution was adopted, the term "United States" designated a definite territory, namely, the thirteen original States and the areas which they had ceded, or had agreed to cede, to the General Government, and that the new government with prescribed powers was established for the benefit of the citizens of this national aggregate of State and Territories. "Thus it was, at the adoption of the Constitution, the United States, as a geographical unit, and as a governmental conception both in the international and domestic sense, consisted not only of States, but also of Territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantial guarantees, all being under the obligation to contribute their proportional share for the liquidation of the debts and future expenses of the General Government."

In short, then, according to this doctrine, the Constitution, from the beginning, extended, *ex proprio vigore*, over the States and the extra-State regions then subject to the sovereignty of the United States. In all that concerned the form of government to be established over them, the inhabitants of these territorial, extra-State districts, were subject to the discretionary control of Congress, but in all else, in the private rights of person and property, and the protection of all the limitations upon the Federal power, express or implied, they were on a plane of perfect equality with the citizens of the States.

With reference, however, to territories acquired since 1789 the doctrine of the opinion was, as has been said, that they do not by annexation become *ipso facto* integral parts of the United States in this constitutional sense until Congress has incorporated them into the Union as such.

In support of this position the court cited legislative action to this effect with reference to territory annexed since 1787 up to the time of the treaty of 1898 with Spain. In each case, with the exception of this last treaty, the treaty of cession had provided that the territories ceded should be incorporated into the United States, or, as in the treaty of 1867 for the purchase of Alaska, that the civilized inhabitants should be "admitted to

the enjoyment of all the rights, advantages and immunities of citizens of the United States.”<sup>5</sup>

If, the opinion asked, the effect of annexation were immediately to incorporate the territory annexed into the United States, what was the need of these express treaty provisions?<sup>6</sup>

The opinion next went on to show that the constitutional doubts expressed by Jefferson at the time of the acquisition of Louisiana were not as to its annexation, but as to its incorporation, as provided by the treaty, into the Union. By reference to various legislative and administrative acts, the opinion showed the territories subsequently annexed to have been either formally incorporated or by necessary implication recognized by Congress as incorporated into the United States. This being so, it is argued that the various earlier *dicta* of the Supreme Court relative to the constitutional limitations resting upon Congress when legislating for the Territories are to be interpreted in that light and do not cover the case of a Territory which has not been incorporated into the United States.

Summing up its doctrine upon this point, the justice reading the opinion declared: “It is, then, as I think, indubitably settled by the principle of

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<sup>5</sup> The treaty for the cession of Louisiana to the United States provided that: “The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States.” (8 U. S. Stat. at L. 202.)

In the treaty with Spain whereby was confirmed the title of the United States to the Floridas the United States agreed that: “The inhabitants of the territories . . . shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.” (8 Stat. at L. 256.)

In the treaty with Mexico by which Mexico relinquished its rights to Upper California and New Mexico the United States promised that: “The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and to be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.” (9 Stat. at L. 930.)

In the treaty with Russia for the annexation of Alaska the United States agreed that: “The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States.” (15 Stat. at L. 542.)

<sup>6</sup> To the author's mind this is by no means conclusive argument; and for two reasons. In the first place, provisions really unnecessary are often inserted in legal documents from abundance of caution; and, in the second place, foreign countries are not presumed to know the constitutional law of foreign countries, and, therefore, the peculiar constitutional rights of the inhabitants of an annexed territory. It is, therefore, a general practice for countries, when handing over certain of their subjects to the political control of a foreign power, to provide as far as possible for the future welfare of these persons the control over whom is thus abandoned.

the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired Territory has reached that state where it is proper that it should enter into and form a part of the American family."

Having established this doctrine, its application to Porto Rico became a comparatively simple matter. The treaty with Spain in no clause provided for incorporation, but, upon the contrary, expressly provided that the civil rights and political statutes of the native inhabitants of the territories should be determined by Congress; and, after annexation, Congress had carefully refrained from any expression of legislative will from which incorporation might be implied.

"The result of what has been said," said the court, "is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."

#### § 266. Position of Justice Brown.

In a separate opinion Justice Brown concurred in the result reached by the four justices whose reasoning we have just been considering, but reached this result by laying down a doctrine that was agreed to by no other of the members of the court. Instead of holding that the term "United States," as used in the Constitution with reference to certain of

the limitations placed by that instrument upon the powers of Congress, included the States and those Territories which had been incorporated into the Union, as held the four justices in whose judgment he concurred, he declared that, strictly speaking, the "United States" was to be construed as referring only to the States, and not to any other territory, whether incorporated or unincorporated. In fact Justice Brown did not admit the existence of a distinction between incorporated and unincorporated Territories, holding that as to all extra-State districts the constitutional limitations upon the powers of Congress apply only when, by congressional action, the Constitution has been extended over them.

After calling attention to the fact that, as decided in the case of *De Lima v. Bidwell*, by cession by treaty with a foreign power, a territory, already in the actual possession of the United States, at once ceased to be foreign and became domestic territory, Brown pointed out that the cases under consideration involved the further and more important question whether upon their becoming domestic territory the provisions of the Federal Constitution were extended of their own force—*ex proprio vigore*—over them. The Constitution not itself directly giving an answer to this, the solution he said will have to be found in the nature of the government created by that instrument. According to this justice's view, this instrument was created, if not by the States, at least exclusively for the States, and not for the Territories or any other extra-State lands that might belong to the United States. Thus, to quote his own words, "It can nowhere be inferred that the Territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of States; and even the provision relied upon here, that all duties, imposts, and excises should be uniform 'throughout the United States' is explained by the subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any State,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.' In short, the Constitution deals with States, their people and their representatives. The Thirteenth Amendment to the Constitution prohibiting slavery and involuntary servitude 'within the United States, or any in place subject to their jurisdiction' is also significant as showing that there may be places within the jurisdiction of the United States that are not part of the Union. . . . Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.' Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'"

To restate, then, the position of Justice Brown, it would appear that, according to his view, the "United States" when looked at from the domestic or constitutional viewpoint, includes in the Union only the individual States such as Virginia, New York, Texas, etc. The Federal District, the Territories, and, in fact, all areas not within the boundaries of some one of these States, though under the national sovereignty are not a part of the Union. Looked at, however, from the international standpoint, the term "United States" has, as Justice Brown later observed, "a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the Territories comprise a part of the government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the territories, as well as of the States, in their foreign relations."<sup>7</sup>

Not being considered a part of the political unit created and organized by the Federal Constitution, it might seem logically to follow that the non-State areas, or rather their populations, would not be entitled to any of the privileges or immunities defined in that instrument. But Justice Brown did not draw this conclusion. Speaking of the limitations laid upon the powers of Congress by the Constitution, he said: "There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may be applied to the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far of local application. Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them." And later on he said: "We suggest, without intending to decide, that there may be a distinction between certain natural rights

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<sup>7</sup> Citing *De Geofroy v. Riggs* (133 U. S. 258).

enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property, to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, suffrage (*Minor v. Happersett*, 21 Wall. 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution, to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States [citing cases]. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

According, then, to Justice Brown, there are some provisions of the Constitution that control Congress and their inhabitants when legislating for such territories as are not within the States and others that do not so apply. Those that do not, he says, may, however, be made applicable by acts of Congress, and in part this has already been done in the case of all but the recently-acquired possessions. And, he implies that when the Constitution has been once formally extended to Territories and their inhabitants, neither Congress nor the territorial legislature can enact laws inconsistent therewith. As to this last assertion it has been argued that if an act of legislation is required to extend the Constitution over a territory, it goes there not as a Constitution but as a statute, and an irrevocable statute is admitted by everyone to be an impossibility—every legislature necessarily possessing a power to repeal equal to its power to enact. This being so, if the premises of Justice Brown be accepted, the

conclusion is drawn that at the present time, every Territory of the United States, organized or unorganized, contiguous or non-contiguous, continental and insular, still remains, except possibly as to a few general rights, absolutely subject to the arbitrary will of Congress. Hawaii and even the District of Columbia in this respect, it is argued, stand upon a footing exactly the same as that of Porto Rico or the Philippines.

In support of his position Justice Brown cited numerous instances in the history of the United States in which acts of Congress have been limited in their application to the States, or, where their application to the Territories has been desired, express provision to that effect has been made. The decisions of the Supreme Court, however, upon the question whether the limitations of the Constitution extend *ex proprio vigore* over the Territories, he admits to have been "not altogether harmonious." Those which upon their face seem inconsistent with his position he explains or attempts to explain away. Thus he avoided the case of *Loughborough v. Blake*<sup>8</sup> by saying that the District of Columbia having once been a part of a State, it could not by cession to the General Government be deprived of the constitutional rights which it had once enjoyed.<sup>9</sup>

Other cases he explained away by maintaining that, prior to the accruing of the causes of action litigated in them, the Constitution had been extended by act of Congress over the Territories concerned.

The very radical position taken by Justice Brown in the Insular cases has been stated at some length because of the prominence that has been given it in the public discussions of the judgments rendered in the Insular cases. As a matter of fact, however, as we have already learned, this position was not concurred in by any one of the other eight justices, and it thus stands not only unsupported by previous opinions of the court, but in flat contradiction to many of them. The "United States,"

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<sup>8</sup> 5 Wh. 317.

<sup>9</sup> He said: "There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had once been a part of the United States ceased to be such by being ceded directly to the Federal Government."

as that term is employed in the Constitution, the four concurring justices said, includes not simply the States, as Justice Brown had said, but also such Territories as have been "incorporated" with them; and the Constitution itself, therefore, extends over them as well as over the States—not of course, however, in the sense that the powers of Congress when legislating for the States and the incorporated Territories are the same, but that, so far as applicable, the provisions of the Constitution are at once applicable to all Territories subject to the sovereignty of the United States, and, therefore, require no act of Congress for their extension, nor can their application to such Territories be denied by Congress.

**§ 267. Argument of Dissenting Justices.**

Four justices (Chief Justice Fuller, and Justices Harlan, Brewer and Peckham) dissented from the judgment rendered in *Downes v. Bidwell*. According to their view there is no constitutional distinction to be drawn between Territories incorporated in the United States and Territories unincorporated and merely appurtenant to the United States. States and Territories, they declared, are the only political units known to American Constitutional Law, and when by a treaty of cession and actual occupation, lands and their inhabitants have come under the sovereignty of the United States, such lands are necessarily a part of the United States, and no approving act of Congress is needed or is efficient to increase the constitutional privileges to which they are entitled and to make effective the legislative limitations upon the powers of Congress.

After calling attention to the essential character of the General Government as one of constitutionally limited powers, the opinion declared: "The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question. To hold otherwise is to overthrow the basis of our constitutional law and moreover, in effect, to reassert the proposition that the States, and not the people, created the government."

With reference to the competence of the treaty-making power to "incorporate" territory in the United States, the dissenting justices urged that the right of annexation being admitted and the Constitution not providing for, or recognizing as possible, territory appurtenant to but not incorporated into the United States, it follows that when territory is annexed by treaty, such territory becomes an integral part of the United States any provisions in the treaty to the contrary notwithstanding. Upon this point, having referred to the clause of the treaty of 1899 with Spain to the effect that "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress," the opinion read: "This was nothing more than a



declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges. Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void."

In the separate opinion which he prepared, Justice Harlan was especially emphatic in his repudiation both of the doctrine asserted by Justice Brown that the Constitution was created "by the people of the United States, as a union of States, to be governed solely by representatives of the States," and of the theory of the other four justices as to the status of "unincorporated" territories.<sup>10</sup>

#### § 268. Summary and Criticism of *Downes v. Bidwell*.

In order fully to appreciate the radical character of the doctrine held by the four justices who concurred with Justice Brown in the judgment in the *Downes* case, it is necessary clearly to appreciate that, it was held, in effect, that this so-called incorporation of a Territory by Congress in the United States is not an act, the commission of which is determined by facts, but only by the formal declaration of an intention, express or implied, by Congress. So long as this intention is not declared, a territory is declared to remain unincorporated in the United States notwithstanding the fact that, as was the case in Porto Rico, a complete Territorial government may have been created, Federal courts established, with the right of appeal therefrom to the United States Supreme Court, and all the local officials required to take an oath to support the Constitution of a Union of which they were not a part. Especially difficult to accept is the declaration that the treaty-making power of the National Government is by itself

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<sup>10</sup> "In view of the adjudications of this court," he declared, "I cannot assent to the proposition, whether it be announced in express words or by implication, that the National Government is a government of or by the States in union, and that the prohibitions and limitations of the Constitution are addressed only to the States. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of States, held together by a compact between themselves; whereas, as this court has often declared, it is a government created by the people of the United States, with enumerated powers, and supreme over States and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the National Government is in any sense a compact, it is a compact between the people of the United States among themselves as constituting in the aggregate the political community by whom the National Government was established. The Constitution speaks, not simply to the States in their organized capacities, but to all peoples, whether of States or Territories, who are subject to the authority of the United States."

incompetent to add territory to the United States in a domestic, constitutional sense. The authority of treaty-making power to annex territory is conceded; the Constitution itself places treaties upon a plane of equality with the statutes of Congress; and the Supreme Court has repeatedly affirmed that a subsequent treaty operates as a repeal of all acts of Congress inconsistent with it; wherefore it would seem irresistibly to follow that when the treaty-making power has accepted an unconditional cession of territory to the United States, that act is as absolutely valid and as fully operative as though Congress itself had legislated upon the subject. To assert the contrary is, in effect, to say that the treaty-making and the law-making powers are not coördinate in authority, the express provision of the Constitution to the contrary notwithstanding.

Again, it may be said in objection to the doctrines declared in the *Downes* case, that in attempting to give to Congress a right to legislate for certain Territories under United States sovereignty, free from certain limitations placed by the Constitution upon its powers, there is seriously weakened, if not, from a strictly logical standpoint, absolutely destroyed, that most fundamental principle of our constitutional jurisprudence according to which all the provisions of the Constitution are equally binding upon Congress. The distinction that is made between the absolute prohibitions of legislative power and the limitations imposed by the Constitution upon the exercise of the powers that are granted, is clearly not calculated to support the conclusion that Congress under certain circumstances may disregard the latter when it may not the former. As Chief Justice Fuller declared in his dissenting opinion: "It is idle to discuss the distinction between a total want of power and a defective exercise of it;" and again, "The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end to the question. To hold otherwise is to overthrow the basis of our constitutional law." Mr. Carlisle in the address from which we have already once quoted, has also shown so clearly the fallacy of the argument of the prevailing opinion upon this point we may quote his words. He says: "The distinction attempted to be taken between the obligatory force of absolute prohibitions upon the power of Congress and the obligatory force of limitations and qualifications imposed by the Constitution upon the exercise of its powers over a particular subject, cannot, in my opinion, be sustained by any sound process of reasoning. It is true that there is a difference in degree between an absolute denial of all power to do a particular thing and a grant of power to do that thing to a limited extent, or in a prescribed manner only; but the absolute prohibition and the express or implied limitation are equally obligatory upon Congress. It is bound to obey both or its act is void. . . . To say that Congress, in legislating for a Territory, is not bound by the

constitutional limitations upon a granted power, but is or may be bound by the express prohibitions, is simply to assert that all parts of the Constitution are not of equal force and effect as restraints upon legislation, and that a power not granted may be constitutionally exercised if it is not expressly prohibited, a theory, which, if sanctioned by the judiciary, would at once revolutionize the government. It would no longer be a government of enumerated and delegated powers, but would possess the whole mass of sovereign power which is now vested in the people, subject only to the comparatively few express prohibitions."

It will have been seen that the net result of the decision in *Downes v. Bidwell*, whether we follow the reasoning of Justice Brown, or of the four justices who concurred in the judgment rendered, is that as to Territories which have not been incorporated into the United States (or, according to Justice Brown, over which the Constitution has not been extended by act of Congress) Congress is not limited by some of the restrictions enumerated or implied in the Constitution. Just which of these limitations do not, in such cases, control Congress, it remains for the Supreme Court to determine in each particular case as the point arises.

In *Downes v. Bidwell* it was held that the restriction that "all duties, excises, and imposts shall be uniform throughout the United States" does not apply.

**§ 269. Status of Hawaii: *Hawaii v. Mankichi*.**

In *Hawaii v. Mankichi*<sup>11</sup> it was held that the provisions of the Fifth and Sixth Amendments with reference to indictment by a grand jury and trial by petit jury, did not apply. The facts and questions of law involved in this case were these. The Joint Resolution of Congress of July 7, 1898, had provided for the annexation of the Hawaiian Islands "as a part of the territory of the United States, and subject to the sovereign dominion thereof." The Resolution, indeed, expressly declared that "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." After the annexation to the United States, Congress not having determined otherwise, the defendant in error, Mankichi, was tried for and convicted of manslaughter according to the usual course of procedure in force in the Republic of Hawaii prior to July 7, 1898, which course of procedure did not require the indictment to be found by a grand jury, and which permitted a less number than the entire twelve of the petit jury to convict. An application for a writ of habeas corpus having been made by Mankichi upon the ground that, according to the Constitution of the United States,

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<sup>11</sup> 190 U. S. 197.

no one might be tried for manslaughter except upon an indictment or presentment found by a grand jury, nor convicted except by a unanimous petit jury, and the case having been appealed to the Supreme Court of the United States, that tribunal was called upon to determine: first, whether it was the intention and the necessary effect of the annexing Joint Resolution to make these constitutional provisions immediately applicable to the islands; and secondly, if it did not, whether it lay within the power of Congress or of the authorities of Hawaii to deny to the accused the rights in question. The court answered the first question in the negative, and the second in the affirmative.

Here, however, as in *Downes v. Bidwell*, the justices constituting the majority did not agree in their reasoning. Justice Brown, in his opinion, admitting that a literal interpretation of the Resolution would support Mankichi's claim, but arguing *ab inconvenienti*, asserted that it could not have been the intention of Congress "to interfere with the existing practice, when such interference would result in imperilling the peace and good order of the islands." "Of course under the Newlands resolution," he continued, "any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it. . . . It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther, and say that most, if not all, the privileges and immunities con-

tained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

In a concurring opinion Justices White and McKenna based their conclusion on the doctrine that by the annexing Resolution Congress had not intended to incorporate the islands *eo instanti* into the United States. With regard to the provision that the municipal legislation of Hawaii not contrary to the Constitution of the United States should remain in force, they said: "Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally continued to the control of the Constitution, clearly referred only to the provisions of the Constitution which were applicable, and not to those which were inapplicable. In other words, having, by the resolution itself, created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times, everywhere, and upon every condition and persons, declared that nothing in the Joint Resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

Chief Justice Fuller and Justices Brewer, Peckham, and Harlan dissented. The first three of these, after adverting to the impropriety of an argument *ab inconvenienti*, contented themselves simply with the statement that, as a matter of fact, the provision of the resolution of annexation which has been quoted above, validating all existing legislation, except such as might be contrary to the Constitution of the United States, should be construed as having extended over the islands the Fifth and Sixth Amendments to that instrument. Justice Harlan, however, in his dissenting opinion, in addition to this, attacked the validity of the position assumed by the majority that it was within the constitutional power of Congress to exclude from operation in a territory, incorporate or not incorporate, any of the provisions of the Constitution.<sup>12</sup>

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<sup>12</sup> He said: "I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment neither the

In effect, then, the prevailing doctrine of this Mankichi case was to hold that the provisions of the Constitution guaranteeing indictment and trial by jury are among those limitations which do not control Congress in legislating for unincorporated Territories, or, according to Justice Brown, for such Territories as have not had the Constitution extended over them by act of Congress.

**§ 270. Right to Trial by Jury Held to Be Not Fundamental.**

There can be no doubt but that this decision of the court that the right to trial by jury is not a fundamental right, but only one of practice and convenience, states a new principle in American jurisprudence. Blackstone speaks of the right as "the most transcendent privilege which any subject can enjoy or wish for"; Kent declares it "a fundamental doctrine"; Story that it is a "sacred and inviolate palladium" of liberty; and decisions of our courts without number have employed similar language in describing it.<sup>13</sup>

A second especial fact to be noted regarding the position of the four justices concurring with Brown in the judgment rendered is that they render most indefinite the criteria by which it may be determined in any given case whether or not a Territory has, in fact, been "incorporated" into the United States. In this case the Territory in question had not been annexed by the treaty power as had the Territories involved in the Insular cases decided in 1901, but by an act of Congress declaring it "a part of the Territory of the United States," and expressly making the Constitution paramount to the local law. Also all the circumstances preceding and attending the annexation of the islands indicated an intention to "incorporate" them into the United States. The treaty which the annexing resolution had taken the place of had expressly provided that the islands "should be incorporated into the United States as an integral part thereof and under its sovereignty," and there is absolutely nothing to show that when the resolution for annexation was adopted, a different destiny was intended for them.

In *Dorr v. United States*,<sup>14</sup> decided in 1904, it was held that trial by jury was not a necessary incident of due process of law in the Philippine Islands. By the act of Congress of 1902 providing for the temporary government of the Philippines various individual rights were guaranteed,

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life nor the liberty nor the property of any person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States."

<sup>13</sup> See article by J. W. Garner, entitled "The Right of Jury Trial in the Dependencies," in 40 *American Law Review*, 1. As to the non-fundamental character of the right to trial by jury see Chapter XCII.

<sup>14</sup> 195 U. S. 138.

among them that no person should be held for a criminal offence without due process of law. But the right to jury trial was not mentioned, and Section 1891 of the Revised Statutes was expressly declared not to be applicable.<sup>15</sup>

This decision was necessarily determined by the *Downes v. Bidwell*, and *United States v. Mankichi* cases; the former case holding that unincorporated territories were not necessarily entitled to all the privileges created by the Constitution; and the latter that the right to a jury trial is not a fundamental right.

Justice Harlan again dissented upon the same grounds as those given by him in the *Mankichi* case.

In *Balzac v. People of Porto Rico*,<sup>16</sup> the court said: "The Insular Cases revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court." In the *Rasmussen* case, as Mr. Justice Brown pointed out in his concurring opinion, the court adopted the doctrine that whether or not the Constitution extends to a territory is one of "interpretation" and not of "extension" by Congress, as stated by Mr. Justice Brown in *Downes v. Bidwell*; that is, in the *Downes* case only four justices held "incorporation" to be the test, while, in the *Rasmussen* case, all the justices, except Harlan and Brown, adopted the incorporation theory. Mr. Justice Brown adhered to the "extension" theory, and Mr. Justice Harlan held fast to the doctrine that the right to jury trial attached without the necessity of either incorporation or extension by Congress.

#### § 271. Alaska Incorporated: *Rasmussen v. United States*.

In *Rasmussen v. United States*,<sup>17</sup> decided in 1905, it was held that Alaska had been incorporated into the United States, and, therefore, that the inhabitants were entitled to jury trial. The court did not, however, attempt to lay down any definite rule for determining when incorporation has taken place, but contented itself with quoting the following sentences from the opinion in *Dorr v. United States*, and holding that the treaty by which Alaska had been acquired, and the legislation of Congress subsequent thereto, did not bring that Territory within the category of unincorporated Territories according to the test implied in the sentences quoted. These quoted sentences were as follows: "If the treaty-making power could in-

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<sup>15</sup> This is the section giving force and effect to the Constitution and laws of the United States not inapplicable within all the organized Territories and every Territory thereafter organized as elsewhere in the United States.

<sup>16</sup> 258 U. S. 298.

<sup>17</sup> 197 U. S. 516.

corporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (article 9) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions. The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for the temporary civil government (32 Stat. at L. 691, Chap. 1369), there is express provision that Sec. 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands."

In this *Rasmussen* case the attempt had been made to maintain the doctrine that, even if incorporated, Alaska was not entitled to the right in question for the reason that it had not been made an "organized" Territory. This contention, however, the court held clearly unsound. Incorporation, and not organization, it was declared was the test as to the general applicability of the Constitution. Justice Brown concurred, but, as might have been expected from his position in *Downes v. Bidwell*, held that the general applicability of the Constitution depended not upon the fact of incorporation, but upon whether Congress had by some expression of its will clearly shown that it intended that the particular provision of the Constitution should apply.

Justice Harlan in a concurring opinion again stated his doctrine that the Constitution in all its provisions extends *ex proprio vigore* over all Territories immediately upon annexation to the United States. "I cannot agree," he said, "that the supremacy of the Constitution depends upon the will of Congress."

#### § 272. Other Insular Cases.

In *Binns v. United States*<sup>18</sup> it was held with reference to license fees imposed on certain kinds of luxuries, that, though Alaska was an incorporated Territory and, therefore, within the scope of the provision of the Constitution that excises shall be uniform throughout the United States, the tax in question was valid as an act passed by Congress acting as a local legislature, and not as a general legislature exercising a power under the clause<sup>19</sup> empowering it to levy and collect taxes to pay the debts and provide for the common defence and general welfare of the United States.

In *Kepner v. United States*,<sup>20</sup> decided in 1904, it was held that, by an act of Congress of 1902, the immunity from double jeopardy for crime as

<sup>18</sup> 194 U. S. 486.

<sup>19</sup> Art. I, Sec. VIII, Cl. 1.

<sup>20</sup> 195 U. S. 100.



provided in the Constitution had been extended to the Philippines. The point urged by the United States in this case that the question as to what constitutes double jeopardy should be settled according to the local Spanish civil law, will be considered in another chapter of this work in which the constitutional provision regarding immunity from a second jeopardy for the same criminal offence will be specially considered.<sup>21</sup>

In *Goetz v. United States* and *Crossman v. United States*<sup>22</sup> the doctrine of *De Lima v. Bidwell* was followed with reference to taxes levied on goods imported into the United States from Porto Rico after the taking effect of the Foraker Act establishing civil government in that island.

In the so-called second Dooley case<sup>23</sup> it was held that the tax collected under the Foraker Act on goods imported into Porto Rico from the United States was not a tax on goods exported from a State and, therefore, forbidden by the Constitution. The tax in question, it was held, was in essential character rather a local Porto Rican tax upon goods coming into that country, than an export tax on goods leaving the United States. As Justice Brown in his opinion said: "There can be no doubt whatever that if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico, at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being and only until the local government is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico. . . . It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. 1, Sec. 8, that 'all duties, imposts and excises shall be uniform throughout the United States.' There is a wide difference between the full and paramount power of Congress in legislating for a Territory in the condition of Porto Rico and its power with respect to States, which is merely incidental to its rights to regulate interstate commerce. The question,

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<sup>21</sup> See § 706.

<sup>22</sup> 182 U. S. 221.

<sup>23</sup> *Dooley v. United States* (183 U. S. 151).

however, is not involved in this case, and we do not desire to express an opinion upon it."

In the concurring opinion read by Justice White, the decision was placed upon the ground that the constitutional provision applies only to goods exported to a country wholly "foreign" to the United States and not to a country appurtenant, as was Porto Rico, to the United States.

Four justices dissented holding that the prohibition operated, and was intended to operate, as a general limitation on the power to regulate commerce whether interstate or foreign. "And this," the dissenting opinion said, "is equally true in respect of commerce with the Territories, for the power to regulate commerce includes the power to regulate not only as between foreign countries and the Territories, but also by necessary implication as between the States and Territories. *Stoutenburgh v. Hennick*, 129 U. S. 141."

"The proposition that because the proceeds of these duties were to be used for the benefit of Porto Rico they might be regarded as if laid by Porto Rico itself with the consent of Congress, and were therefore lawful, will not bear examination. No money can be drawn from the Treasury except in consequence of appropriations made by law. This act does not appropriate a fixed sum for the benefit of Porto Rico, but provides that the money collected from the citizens of the United States, shall be placed in a separate fund or subsequently in the treasury of Porto Rico, to be expended for the government and benefit thereof. And although the destination of the proceeds in this way were lawful, it would not convert duties on articles exported from States into local taxes. States may, indeed, under the Constitution lay duties on foreign imports and export for the use of the Treasury of the United States, with the consent of Congress, but they do not derive the power from the General Government. The power pre-existed, and it is its exercise only that is subjected to the discretion of Congress. Congress may lay local taxes in the Territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the Territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress, as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the States as well as the products of the States from Porto Rico; and this notwithstanding it was held in *De Lima v. Bidwell* (182 U. S. 1) that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."<sup>24</sup>

In *Lincoln v. United States*, and *Warner, Barnes & Co. v. United*

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<sup>24</sup> This case will be again considered in connection with the discussion of the taxing powers of the United States.

States <sup>25</sup> it was held that the existence of an alleged insurrection of the natives in the Philippine Islands after the ratification of the treaty of peace with Spain did not justify the exaction under a military order of duties on imports from the United States into Manila after that date. The Diamond Rings case <sup>26</sup> was held to govern.

That the Thirteenth Amendment forbidding slavery and involuntary servitude except as punishment for crime applies in the unincorporated as well as in the incorporated Territories, is clear, its language expressly extending its force not only to the United States but to "any place subject to their jurisdiction."

Certain forms of slavery do, however, possibly exist in some of the Philippine Islands, but there is of course no legality in this, and as soon as is possible, the custom or practice will be suppressed if, indeed, it has not already been suppressed.

#### § 273. The Panama Canal Zone.<sup>27</sup>

The status of the Panama Canal Zone is such a special one that it deserves special description.

By the act of Congress of June 28, 1902,<sup>28</sup> authority was given to the President of the United States to acquire a strip of land between the Caribbean Sea and the Pacific Ocean for the construction of a canal, and provision made for the creation of an Isthmian Canal Commission through whom the canal was to be constructed.

By Article II of the treaty between the United States and the Republic of Panama, ratifications of which were exchanged on February 26, 1904, the Republic of Panama granted to the United States, "in perpetuity," the use, and occupation and control of a described strip of land ten miles in width, and appurtenant waters and islands for the "construction, maintenance, operation, sanitation and protection" of the proposed canal.

Article III of this treaty provided: "The Republic of Panama grants to the United States all the rights, power and authority within the Zone mentioned and described in Article II of this Agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

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<sup>25</sup> 197 U. S. 419.

<sup>26</sup> 183 U. S. 176.

<sup>27</sup> For an excellent article dealing with the Canal Zone see that of W. K. Jackson entitled "The Administration of Justice in the Canal Zone" in *Virginia Law Review*, IV (October, 1916).

<sup>28</sup> 32 Stat. at L. 481.

By act of Congress of April 28, 1904, it was provided that, until the expiration of the fifty-eighth Congress, unless provision for the government of the Canal Zone should be sooner made, "all military, civil and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all rights, powers and authority granted by the terms of the said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President [of the United States] shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, and property, and religion."<sup>29</sup>

In exercise of the authority thus vested in him, the President placed the Isthmian Canal Commission under the authority and supervision of the Secretary of War, and defined the fundamental principles in accordance with which the Zone should be governed.<sup>30</sup> This letter thus became, as it were, a Constitution for the Zone. *Inter alia*, the letter provided that the Canal Commission might legislate for the Zone on all rightful subjects not inconsistent with the laws and treaties of the United States. Such legislative power, it was specifically declared, should include authority to raise and appropriate revenues for the Zone.

In accordance with the authority thus delegated to it, the Commission created judicial and administrative agencies for the Zone. With regard to the courts thus created it is interesting to observe that the decisions of the highest court of the Zone—the Supreme Court—became final, since Congress had not vested in any of the courts of the United States jurisdiction to entertain appeals in cases arising in the Zone.<sup>31</sup>

By act of August 24, 1912, known as the Panama Canal Act,<sup>32</sup> the President was authorized to discontinue the Isthmian Canal Commission, and, for the future government of the Zone, to appoint a Governor and other officials. Section 7 of the act declared: "The Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone which is to be held, treated and governed as an adjunct of the Panama Canal."

In pursuance of the authority thus given, the President, on January 27, 1914, issued a comprehensive Executive Order "To Establish a Permanent Organization for the Panama Canal"; and on April 1, 1914, by another order, the existing Isthmian Canal Commission was abolished, and

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<sup>29</sup> 33 Stat. at L. 429.

<sup>30</sup> See Letter of the President of May 9, 1904, to the Secretary of War.

<sup>31</sup> For a decision that there was no such appeal, see *Coulson v. Canal Zone* (212 U. S. 553).

<sup>32</sup> 37 Stat. at L. 565.

the new one provided for by the act of August 24, 1912, created. On August 15, 1914, the Canal was opened to traffic.

By the act of August 24, 1912, as amended by the act of September 21, 1922,<sup>33</sup> the Circuit Court of Appeals of the Fifth Circuit of the United States was given jurisdiction "to review, revise, modify, reverse, or affirm final decrees of the district court of the Canal Zone" in certain cases. By the act of February 13, 1925,<sup>34</sup> amending the Judicial Code, this right of review was placed in the Circuit Court of Appeals of the Fifth Circuit of the United States.<sup>35</sup>

It is clear from the foregoing account that the Canal Zone has not been "incorporated" into the United States and thus, in this respect, that those constitutional provisions which, it has been judicially held, do not apply to such areas, do not apply within the Zone. This point has not been expressly declared by the Supreme Court in any case coming before it, but it has been relied upon by Congress in legislating for the Zone. For example, trial by jury was not provided for in the Zone except in capital criminal cases until the Executive Order of President Wilson, effective July 4, 1913; and, by act of March 2, 1905,<sup>36</sup> Congress declared the Zone foreign territory so far as the United States customs laws are concerned. In fact, no Federal laws, civil or criminal, are applicable to the Zone except as expressly so provided. Indeed, it was held by the Bureau of Naturalization that residence in the Zone could not be counted in fulfillment of the requirement with regard to continuous residence within the United States in order to obtain American citizenship;<sup>37</sup> and, as we have

<sup>33</sup> 42 Stat. at L. 1006.

<sup>34</sup> 43 Stat. at L. 936.

<sup>35</sup> The provision regarding appeals from the district court of the Zone reads: "The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the district court of the Canal Zone, and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds \$1000, to be ascertained by the oath of either party or by other competent evidence, and also in criminal cases, wherein the offence charged is punishable as a felony; and also in civil and criminal cases in which the jurisdiction of the trial court is in issue, but whenever such case is not otherwise reviewable in said appellate court the question of jurisdiction alone shall be reviewable by said appellate court. And such appellate jurisdiction, subject to the right of review or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgment and decrees of the district courts of the United States."

<sup>36</sup> 33 Stat. at L. 843.

<sup>37</sup> By act of May 9, 1918, amending the naturalization laws of the United States (40 Stat. at L. 542) it was provided that residence within the Zone might be counted in fulfillment of the three years' requirement of residence in the United States for naturalization of aliens with previous military or naval service.

seen, until the establishment of a permanent government for the Zone in 1914, there was no appeal to the courts of the United States from decisions of the courts established in the Zone. By Section 12 of the Panama Canal Act of August 24, 1912,<sup>38</sup> which deals with the matter of extradition of fugitives from justice, Congress took pains to declare in explicit terms that the Zone was not to be regarded as an "organized Territory of the United States."<sup>39</sup>

Though, as has been said, there has been no decision of the Supreme Court as to the extent to which Congress or the President is limited by provisions of the Federal Constitution when dealing with the Zone, the matter was discussed with some particularity by the Canal Zone Supreme Court in the case of *Ex parte Mena*,<sup>40</sup> in which General Mena, a revolutionary Nicaraguan leader who had been engaged in hostilities with American forces which had been landed in Nicaragua, had been brought by the American forces to the Zone and was being refused permission to leave the Zone. In its opinion in this case, which was one arising on application for a writ of habeas corpus, the court said: "It has been held by this court that the Constitution of the United States does not of its own force carry its rights, privileges, and limitations into the Canal Zone. The President's right of action on the Zone, therefore, is not limited by constitutional limitations. He is undoubtedly vested with larger right, authority, and power here than in any other territory controlled by the United States. He has absolute authority, in the absence of congressional legislation, to legislate for the Zone." After discussing and sustaining the constitutional power of the President, in the circumstances, to authorize or sanction the taking prisoner of General Mena and expatriating him to the Zone, the court declared: "It would follow that the Chief Executive acting in his best discretion, would seem to have the authority to transport such person to any territory *strictly under executive control* (italics supplied) and there place him under such restraint and surveillance as would prevent him from returning to the country from which he had been carried as a prisoner until such time as the President in his best judgment and discretion should deem such return not inimical to the conservation of good order or to the international interests of the United States."

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<sup>38</sup> 37 Stat. at L. 560.

<sup>39</sup> The section reads: "That all laws and treaties relating to the execution of persons accused of crime in force in the United States, to the extent that they may not be in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States."

<sup>40</sup> 2 Canal Zone Sup. Ct. Rep. 170.

Although one cannot speak with complete confidence, it would appear from the foregoing that the present constitutional status of the Canal Zone is such that Congress, or the Executive in default of congressional action, has at least as free a hand to act as is the case with the so-called unincorporated territories of the United States. Possibly, indeed, there are constitutional limitations which apply in the case of those territories which do not apply to the Zone, for it is to be observed that the Zone may, in some respects, be regarded as "foreign territory," though, by lease, under the jurisdiction of the United States which is continued as long as the United States pays to the Republic of Panama the rental provided for in Article XIV of the Treaty of 1903 (ratified in 1904). To the extent that this "foreign" status of the Zone is emphasized, it is possible, therefore, to measure the constitutional powers of the President and of Congress by those enjoyed by them with reference to foreign territory which is under the temporary control of the United States whether as a result of military operations or of treaty provisions.

In *Wilson v. Shaw* <sup>41</sup> attempt was made to obtain a judgment of the Supreme Court as to whether the United States had obtained title to the Zone and whether Congress had the constitutional power to provide for the construction of a canal across it. To the contention that the title to the Zone had not been obtained by the United States by treaty with Colombia as provided for by the act of Congress of June 28, 1902, the court replied that, whatever force might be ascribed to the fact that the treaty had been with Panama, Congress had impliedly, by various Acts dealing with the Zone, ratified the executive action,—“They show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts.” As to the power of Congress to provide for the construction of the canal, the court, after a citation of cases, said: “These authorities recognize the power of Congress to construct interstate highways. *A fortiori*, Congress would have like power within the territories and outside the State lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the States.”

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<sup>41</sup> 204 U. S. 24.

## CHAPTER XXXII

### CITIZENSHIP IN THE TERRITORIES

#### § 274. Effect of Cession of Territory on Citizenship of Inhabitants.

Whether or not inhabitants of territories ceded by one nation to another necessarily have, according to the principles of International Law, the option of becoming citizens of the annexing State, or of retaining their old citizenship, is a point upon which International Law writers do not seem to be fully agreed. Rivier, for instance, in his recent work, "*Principes du Droit des Gens*," declares that they have not—that, unless expressly provided otherwise, they become, *nolens volens*, the subjects of the power to which their territory is united. Other text-book writers, Westlake and Halleck, for instance, claim that the treaty of cession being silent upon this point, an option exists.<sup>1</sup> Halleck declares: "The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The status of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State, and is not unjust toward those who determine not to become its subjects. According to this rule, domicile, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided."

That, in the absence of treaty stipulations to the contrary, the citizenship of the inhabitants of ceded territory is to be that of the annexing

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<sup>1</sup> This right of option as regards citizenship is not to be confounded with the right, by some alleged to exist, of the inhabitants to decide whether or not they will consent to a transfer of sovereignty over their territory to another power. Such a right has never been accepted by International Law writers, nor recognized by the United States in any of the annexations by it of new territories.



State is generally admitted by American International Law writers, and has been more than once declared by the United States Supreme Court. In *American Insurance Co. v. Canter*, the court said: "The same act which transferred their territory transfers the allegiance of those who remain in it;" and in *Boyd v. Thayer* <sup>2</sup> it was declared that "the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided."

#### § 275. Treaty Provisions.

In all the treaties entered into by the United States whereby territory was acquired, prior to that with Spain in 1898, it was provided either that the inhabitants of the ceded territories remaining therein should be admitted as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, or that they should be "incorporated in the Union of the United States," or both. It cannot, however, be said with certainty, as has been maintained by some, that it was due to these provisions that the inhabitants of the ceded territories were collectively naturalized, for this point has never been squarely passed upon by the Supreme Court. The undoubted purpose and the probable legal effect of these provisions was only to create an obligation on the part of the United States not to discriminate civilly against these peoples, and, when the conditions should warrant, to confer upon them full political privileges. The determination when this time had arrived was left to the discretion of Congress. Provisions similar to those of which we have been speaking are almost always inserted by all nations in treaties of cession at the instance of the ceding power, as a matter of equity, it being but just that, in handing over to the control of another power citizens of its own, a State should, as far as possible, obtain a guarantee that they should not be civilly or politically oppressed.

By these treaties of cession entered into by the United States, the inhabitants of the ceded territories did become, however, United States citizens under the general rule quoted above, because those treaties continued no stipulations to the contrary.

In the treaty of peace with Spain which provided for the cession to the United States of Porto Rico, Guam, and the Philippines we find for the first time appearing a provision expressly asserting that the cession of the islands is not to operate as a naturalization of their native inhabitants, but that the determination of their civil rights and political status is to be left to the subsequent judgment of Congress. Spanish subjects, natives of the Iberian Peninsula, but resident in the islands, are, however, given the

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<sup>2</sup> 143 U. S. 135.

right to elect whether or not they will retain their old citizenship or become American subjects.<sup>3</sup>

Relative to the effect of the treaty provision, that the civil or political status of the native inhabitants of the ceded territories is to be determined by Congress, a question presents itself, which has not yet been passed upon by the Supreme Court. This is, whether it is within the constitutional competence of the treaty-making power to confer upon Congress the right to determine whether or not the inhabitants of territories coming under the sovereignty of the United States shall become its citizens. The Constitution declares that the acts of the treaty-making power, as well as those of the Federal legislature, shall be the supreme law of the land. The validity of both are, however, dependent upon their consonance with the requirements of the Constitution. If, then, according to that instrument, there may not be subjects of the United States who are not also its citizens, no treaty can give to the law-making branch the power to treat any persons as such. In the *Insular* cases it was held that the islands obtained from Spain had not been incorporated into the "United States." Their inhabitants have not been naturalized by statute, and the treaty with Spain expressly refuses to them citizenship. The whole question of their civil status thus depends upon whether or not they are citizens according to the provision of the Fourteenth Amendment, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That is to say it will depend upon whether the term "United States," as here employed, will be construed to exclude or include "unincorporated" Territories.

As has been said, this question has not been passed upon precisely, by the Supreme Court, but the positions taken in the *Insular* cases would indicate that inhabitants of these insular possessions, though subject to the sovereignty of and owing allegiance to the United States, are not citizens within the strict constitutional sense. Certainly by the executive

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<sup>3</sup> The provisions of the treaty upon these points are as follows: "Spanish subjects, natives of the peninsula [of Spain] residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making before a court of record within a year from the date of exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil right and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

and legislative departments of the National Government the position has been taken that they are not.

**§ 276. Statutory Provisions.**

The citizens of Hawaii were made citizens of the United States by statute enacted April 30, 1900.

The act of July 1, 1902, providing for the administration of civil government in the Philippine Islands, declares that "All inhabitants of the Philippine Islands continuing to reside therein, who were Spanish subjects on the 11th day of April, 1899, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between Spain and the United States, agreed at Paris, December 10, 1898." The status thus given to Filipinos has not since been changed.

The act of April 12, 1900,<sup>4</sup> establishing a civil government for Porto Rico, provided that: "All inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain, on or before the 11th day of April, 1900, in accordance with the provisions of the treaty of peace entered into on the 11th day of April, 1899; and they together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of the People of Porto Rico, with guaranteed powers as hereafter confirmed, and with power to sue and be sued as such."

Section 30 of the Naturalization Act of June 29, 1906, provided: "That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The Applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission, and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

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<sup>4</sup> 31 Stat. at L. 77.

**§ 277. Native Inhabitants of Porto Rico Not Aliens: *Gonzales v. Williams*.**

In *Gonzales v. Williams* <sup>5</sup> it was held that a native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States is not an "alien" within the meaning of the act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. No position was taken by the court, however, with reference to the question of citizenship. In its opinion the court said: "We are not required to discuss . . . the contention of Gonzales counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of the commissioner Degetau, in his excellent argument as *amicus curiæ*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891. . . . We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens and subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States,—are not 'aliens' and upon their arrival by water at the ports of our mainland are not 'alien immigrants,' within the intent and meaning of the act of 1891."

By act of Congress of March 2, 1917,<sup>6</sup> full American citizenship was given to the Porto Ricans.

Prior to their being thus collectively naturalized passports had been issued to Porto Rico under the provisions of the act of June 14, 1902,<sup>7</sup> that passports might be issued to or verified for persons owing allegiance to the United States. It is under this provision that passports are now issued to citizens of the Philippine Islands.

**§ 278. Territories Not Suable.**

The Supreme Court has held that the Territories of the United States such as Porto Rico and Hawaii are not suable without their consent. Thus, in the Hawaiian case of *Kawananakoa v. Polybank*,<sup>8</sup> the court declared that the doctrine of the non-suability of political entities "is not confined to powers that are sovereign in the full sense of the judicial theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property from which persons within the jurisdiction derive their rights." And, with reference to Porto Rico,<sup>9</sup> the court said: "It is not open to controversy that, aside

<sup>5</sup> 192 U. S. 1.

<sup>6</sup> 39 Stat. at L. 953, Sec. 5.

<sup>9</sup> *People of Porto Rico v. Rosaly of Castillo* (227 U. S. 270).

<sup>7</sup> 32 Stat. at L. 386.

<sup>8</sup> 205 U. S. 349.

from the existence of some exceptions, the Government which the Organic Act established in Porto Rico is of such a nature as to come with the general rule exempting a government sovereign in its attributes, from being sued without its consent. In the first place, this is true because in a general sense, so far as concerns the framework of the Porto Rican Government, and the legislative, judicial and executive authority with which it is endowed, there is, if not complete identity, at least, in all essential matters, a strong likeness to the powers usually given to organized territories, and, moreover, a striking similarity to the Organic Act of the Hawaiian Islands. . . . But as the incorporated territories have always been held to possess an immunity from suit, and as it has been, moreover, settled that the Government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico."

It would seem reasonably certain that, should the point come before the Supreme Court, the Government of the Philippine Islands will be held similarly immune from suit. This holding has, in fact, been made by the Philippine Supreme Court.<sup>10</sup>

With respect to the matter of suability the Territories and such dependencies as Porto Rico and the Philippines are distinguished from the District of Columbia, which is held suable.<sup>11</sup> In *Kawananako v. Polyanak*,<sup>12</sup> the court, explaining this distinction, said: "The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District."

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<sup>10</sup> *Merritt v. Government of the Philippine Islands* (34 Phil. Rep. 311). Cf. Malcolm, *Philippine Constitutional Law*, 2d ed., p. 288.

<sup>11</sup> *Metropolitan R. Co. v. District of Columbia* (132 U. S. 1).

<sup>12</sup> 205 U. S. 349.

## CHAPTER XXXIII

### FOREIGN RELATIONS: THE TREATY POWER

In the discussion of the constitutional power of the United States to extend its sovereignty over new territories and to govern such territories when acquired, the fact has been adverted to and relied upon, that the control of the political relations of the United States with foreign nations is exclusively vested in the General Government. We have now to examine in detail the consequences which flow from this fact, and to examine into the manner in which the Constitution has provided that the Federal powers thus vested are to be exercised.

#### § 279. The Federal Power Exclusive.

The exclusiveness of the Federal jurisdiction in all that politically concerns foreign affairs is deducible both from the national character of the General Government, and from the express provisions of the Constitution.

The States are expressly forbidden to "enter into any treaty, alliance, or confederation," "to grant letters of marque and reprisal," or, unless Congress consents, to "lay any duty of tonnage, keep troops or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will admit of no delay."

Upon the other hand, the General Government is expressly empowered "to provide for the common defence and general welfare of the United States"; "to regulate commerce with foreign nations"; "to make treaties"; "to establish an uniform rule of naturalization"; "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations"; "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water"; "to raise and support armies"; "to provide and maintain a navy"; "to make rules for the government and regulation of the land and naval forces"; "to provide for the calling forth the militia to . . . repel invasions"; "to appoint ambassadors and other public ministers and consuls"; to adjudicate causes arising under treaties, and all cases affecting ambassadors, other public ministers and consuls, cases of admiralty and maritime jurisdiction, and controversies between a State, or the citizens thereof, and foreign States, citizens and subjects. Finally, it is declared that: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the

United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

From these express grants of power to the General Government, and prohibitions of treaty powers to the States, the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs is, at least in their political aspects, readily deducible.

#### § 280. Extent of the Federal Power.

The control of foreign relations by the Federal Government, in at least their political aspects, is not only exclusive but comprehensive in its extent. That is to say, the Federal Government, in its dealing with foreign powers, or with reference to matters that may fairly be said to be of international rather than of purely municipal concern, is competent to act. This general authority in the United States is fairly deducible from the fact that in its dealings with other States the United States appears as the sole representative of the American people; that upon it rests, therefore, the obligation to perform all the duties which International Law imposes upon a sovereign State; and that, therefore, having these duties to perform, it is to be presumed to have commensurate powers. "That would appear to be a most unreasonable construction of the Constitution," said the court in the *Legal Tender* cases, "which denies to the government created by it the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties." The court then went on to declare: "And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. . . . And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his *Commentaries on the Constitution*, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given."<sup>1</sup>

This doctrine thus asserted in the *Legal Tender* cases has been especially emphasized by the Supreme Court in passing upon the constitutional power of the United States to exclude or expel undesirable aliens. In

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<sup>1</sup> 12 Wall. 457.

the Chinese Exclusion cases <sup>2</sup> the court said: "While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . The control of local matters being left to local authorities, and national matters being intrusted to the Government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for the national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

And in *Ekiu v. United States* <sup>3</sup> the court declared: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such case and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, 94, 100; 1 Phillimore (3d ed.), chap. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

Again, in *Fong Yue Ting v. United States*,<sup>4</sup> the following language is used: "The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892 is consistent with the Constitution. The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective. The only government of this country, which other nations recognize or treat with, is the Government of the Union; and the only American flag known throughout the world is the flag of the United States."

In an earlier chapter we have seen that the power of the United States to annex territory is deducible not merely from such express grants of power, as to enter into treaties, to declare war, etc., but from the national sovereignty of the United States in its international relations.

In *United States v. Forty-Three Gallons of Whisky*,<sup>5</sup> Justice Davis

<sup>2</sup> 130 U. S. 581.

<sup>3</sup> 142 U. S. 651.

<sup>4</sup> 149 U. S. 698.

<sup>5</sup> 93 U. S. 188.



declared: "It cannot be doubted that the treaty-making power is ample to cover all the usual subjects of diplomacy with the different Powers"; and in *De Geofroy v. Riggs*<sup>6</sup> there occurs the statement: "That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the Governments of other Nations, is clear." Likewise, in *Downes v. Bidwell*,<sup>7</sup> the assertion is made that "the treaty-power vested in our Government extends to all proper subjects of negotiation with foreign Governments."

Reference may also again be made to the declaration of the court in *MacKenzie v. Hare*,<sup>8</sup> that "as a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."

The reasoning of the court in the maintenance of the principle that the extent of the power of the Federal Government with reference to matters of international concern may be measured by the powers habitually exercised by other sovereign States is sound. This appeal, however, to the fact of "national sovereignty" as a source of Federal power is not a valid one outside of the international field. It cannot properly be resorted to when recognition of an international obligation on the part of the United States is not involved, and when, therefore, the matter is purely one relating to the reserved powers of the States or to the private rights of the individuals. To permit the doctrine to apply within these fields would at once render the Federal Government one of unlimited powers.<sup>9</sup>

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<sup>6</sup> 133 U. S. 258.

<sup>7</sup> 182 U. S. 244.

<sup>8</sup> 239 U. S. 299.

<sup>9</sup> The Supreme Court has, however, upon several occasions employed language which would imply the acceptance of the doctrine in this improper manner, or, at least, has appealed to it in support of conclusions reached upon other grounds. Thus in the *Legal Tender* cases (12 Wall. 457), Justice Bradley said: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is vested with power over all foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulation and laws. . . . Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally conceded to belong to every government as such, and as being essential to the exercise of its functions."

And in *Juillard v. Greenman* (110 U. S. 421) the court derived additional support for its position upholding the constitutionality of the *Legal Tender* laws, from the doctrine that sovereign nations generally have the power. The court, in its opinion, said: "The power, as incident to the power of borrowing money and issuing bills or notes of the Government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and

### § 281. General Extent of the Treaty Power.

One of the best discussions by the Supreme Court of the general extent of the treaty power of the United States is that in the opinion rendered in the case of *Missouri v. Holland*,<sup>10</sup> in which was upheld the constitutionality of the Migratory Bird Treaty of December 8, 1916, between the United States and Great Britain, and the act of Congress of July 3, 1918,<sup>11</sup> in execution thereof. The court held that there could be no question as to the constitutionality of the act of Congress if the treaty itself were valid, and thus the only question to be considered was as to this validity.<sup>12</sup> The court said: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they

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adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. . . . The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States, . . . Congress as the legislature of a sovereign nation, being expressly empowered by the Constitution to lay and collect taxes, etc. . . . and the power to make the notes of the government a legal tender in the payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in the payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress."

In the foregoing it will be observed that the court finds the legal tender power implied in other powers expressly given by the Constitution to Congress, but the validity of this implication it founds on the nature of sovereignty as exemplified in the political world generally.

Again in *United States v. Jones* (109 U. S. 513) with reference to the power of eminent domain, the court said: "The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in *Boom v. Patterson* (98 U. S. 403), requires no constitutional recognition."

<sup>10</sup> 252 U. S. 416.

<sup>11</sup> 40 Stat. at L. 755. An earlier act of Congress, not in pursuance of a treaty, which had sought to regulate the killing of migratory birds had been held unconstitutional in a Federal District Court, in *United States v. Shauver* (214 Fed. 154); and *United States v. McCullough* (221 Fed. 288), on the ground that migratory birds are owned by the States of the Union in their sovereign capacity for the benefit of their own citizens, and that Congress has no power, under the commerce clause or otherwise, to interfere with the rights of control possessed by the States by virtue of this ownership.

<sup>12</sup> The suit was by a State to enjoin a game warden of the United States from attempting to enforce the act.

must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could and it is not lightly to be assumed that in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *Andrews v. Andrews*.<sup>13</sup> What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet considering the particular case before us, but only are considering the validity of the test proposed.<sup>14</sup> With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter [the migratory birds] is only transitorily within the State [of the Union], and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and, were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld."

**§ 282. Though Comprehensive in Scope, the Treaty-Making Power of the United States Is Not without Constitutional Limits.**

It will have been seen from the quotation made in the previous section from the opinion of the court in the case of *Missouri v. Holland*<sup>15</sup> that the question was raised whether there were any constitutional limits to the treaty-making power of the United States beyond those that relate to the manner in which treaties are to be made, that is, by the President with the concurrence of two-thirds of the Senators present at the time the treaties are acted upon by the Senate; but that, later on in

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<sup>13</sup> 188 U. S. 14.

<sup>14</sup> That is, whether, by means of a treaty, the Federal legislature can be empowered to do what, without a treaty, it would be constitutionally incompetent to do.

<sup>15</sup> 252 U. S. 416.

the opinion, the point was emphasized that the treaty, the constitutionality of which was sustained, did not contravene any prohibitory words of the Constitution. If, then, we give weight to this observation, as, indeed, it would seem should be done if accepted general principles of constitutional construction be followed, it results that, though comprehensive in scope, the treaty-making power of the Federal Government must, in its exercise, as concerns the substance of the agreements entered into, have regard for the various constitutional limitations, necessarily implied as well as those expressed, which restrain generally the exercise of Federal powers. Indeed, the Supreme Court has several times said, in so many words, that the authority given to the United States to enter into treaties does not extend "so far as to authorize what the Constitution forbids."<sup>16</sup>

### § 283. Labor Treaties.

Should the United States give its adherence to the Covenant of the League of Nations, there would arise the question as to its constitutional power by statute or by treaty to "secure and maintain fair and humane conditions of labor for men, women and children both in their own countries and in all countries to which their commercial and industrial relations extend," as provided for in Article 23 of the Covenant.

A similar question will arise should the United States either by treaties, or by statutes in pursuance of treaties recommended by the International Labor Organization, created in pursuance of Part XIII of the Treaty of Versailles, attempt to regulate labor conditions within the States of the Union. Such regulation could be held constitutional only if the courts deem the matter to be one that may fairly be said to be of sufficient international significance to make it a legitimate subject for international coöperation and agreement.

### § 283a. The Manner of Exercise of the Treaty-Making Power.

The Constitution<sup>17</sup> provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

It was not until the closing days of the Constitutional Convention that the President was associated with the Senate in the negotiation and ratification of treaties. Upon August 23d, however, Madison observed, "that the Senate represented the States alone, and for this as well as other obvious reasons it was proper that the President should be made an agent in the treaties." September 4th, the Committee to which undetermined sections of the Constitution had been referred, reported back the treaty clause

<sup>16</sup> The most recent declaration to this effect is that in *Asakura v. City of Seattle* (265 U. S. 332).

<sup>17</sup> Art. II, Sec. 2, Cl. 2.

in substantially the form in which it now appears. The only discussion which the clause then received was with reference to the size of the majority that should be required in the Senate for approval of treaties, and whether treaties of peace should not, by way of exception, require more than a simple majority vote.

The second clause of Article VI of the Constitution declares that "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution and laws of any State to the contrary notwithstanding." It had been suggested in the Convention by Gouverneur Morris that no treaty should be binding on the United States until ratified by a law, but, the disadvantages of such a provision being pointed out, the suggestion was voted down. A proposal was also made, but rejected because of the frequent necessity of secrecy, that the House of Representatives should participate with the Senate in the ratification of treaties.

That treaties duly ratified should bind the States, and be beyond their power to change, was never questioned in the Convention. Until August 23d, it was agreed that the General Government should have an express power to enforce by arms all treaties, but this provision was then stricken out for the reason that treaties being expressly declared to have the force of law, the Federal judicial power would have sufficient authority to determine when they were infringed and to order their enforcement.

In the State ratifying conventions the fact that treaties were to be superior to State constitutions and laws created not a little fear of possible oppression. In Virginia Patrick Henry raised strong objection to this, and in several States there was urged, but without result, the necessity of an amendment specifically declaring that no treaty should operate to change the Constitution of a State.

#### § 284. The Negotiation of Treaties.

With respect to the manner in which treaty-making is, according to the Constitution, to be conducted, the first question that arises is as to the extent to which the Senate may properly participate not only in the ratification, but in the preliminary negotiation of international agreements.

In the same clause, indeed in the same sentence, of the Constitution in which provision is made for entering into treaties, it is provided that the President "shall nominate and by and with the advice of the Senate shall appoint ambassadors, other public ministers and consuls," etc. Here the phraseology shows that the act of nominating the public officials mentioned is clearly distinguished from their appointment. They are to be nominated by the President, but are to be appointed by the Senate and President. The negotiating of treaties is not, however, by the phra-

seology of the treaty clause thus sharply distinguished from their ratification as regards the Federal organs by which this negotiation and ratification is to be performed. The language is that the President "shall have power, by and with the advice and consent of the Senate, to make treaties," not that "he shall negotiate, and, with the consent of the Senate, ratify treaties."

As further indicative of an intended participation of the Senate in the negotiation of treaties is the fact, already adverted to, that in the Convention, until almost the last moment, it was agreed that the treaty-making power should be vested exclusively in the Senate, a body the membership of which at that time it was thought would remain comparatively small.<sup>18</sup>

Actual practice exhibits frequent instances in which the Senate has participated in the negotiation of treaties.

During the first years under the Constitution the relations between the President and the Senate were especially close. In 1789 President Washington notified the Senate that he would confer with them with reference to a treaty with certain of the Indian tribes, and, on the next day, and again two days later, went with General Knox before that body for that purpose. Again, in 1790, President Washington in a written communication asked the advice of the Senate as to a new boundary treaty to be entered into with the Cherokees. So also, in 1791, he asked the Senate to advise him as to what answer should be made to the French *Chargé des Affaires*, with regard to a question of tonnage on foreign vessels.

John Quincy Adams in his *Memoirs*<sup>19</sup> relates that Crawford told him that Washington went to the Senate with a draft of a treaty; that "they debated it, and proposed alterations, so that, when Washington left the Senate Chamber, he said he would be damned if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate."

In fact, however, though the President never thereafter went personally before the Senate to discuss with it the negotiation of a proposed treaty, Washington and later Presidents continued occasionally to consult with the Senate regarding proposed international agreements; and the Senate,

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<sup>18</sup> It would appear that the original intention of the framers of the Constitution was that the Senate should act more as an executive council than as an upper legislative chamber. See Ford, *Rise and Growth of American Politics*. "The law makes the Senate the adviser of the President in the making of a treaty through all its stages—not that it requires that, in every instance, the President shall have the advice and consent of the Senate, but that, in every instance, the President has the right to have it, and correspondingly, in every instance, the Senate has the right to enforce it. It is a reciprocal right for a common benefit." Senator A. O. Bacon in the *North American Review*, April 19, 1906.

<sup>19</sup> VII, 427.

upon its part, has, from time to time, adopted resolutions suggesting to the President that negotiation of treaties with reference to specified matters be entered upon.

In 1794, when Washington sent a message to the Senate nominating John Jay as an envoy extraordinary to arrange, if possible, for a settlement of pending disputes between Great Britain and the United States, considerable opposition was displayed and a resolution introduced in the Senate: "That previous to going into the consideration of the nomination of a special envoy to the Court of Great Britain, the President of the United States be requested to inform the Senate of the whole business with which the proposed Envoy is to be charged."<sup>20</sup> This resolution failed to pass and the instructions to Jay were given to him by the President without consulting the Senate thereupon.

In 1795 the treaty negotiated by Jay was approved by the Senate upon condition that it be modified upon a certain specified point. This change was agreed to by Great Britain and the treaty, thus amended, was proclaimed by the President without again submitting it to the Senate.

Jay's treaty thus marked the right of the Senate to advise an amendment, or at least a reservation, but it also served to establish a precedent for the negotiation of treaties by the President without the coöperation of the Senate.

In 1816, following soon after the ratification of a treaty of commerce and navigation with Great Britain, the Senate Committee on Foreign Affairs, reporting upon certain resolutions that had been referred to it with reference to recommending further negotiations by the President with Great Britain upon other specified matters, considered whether there were objections to interference by the Senate in the direction of foreign relations. As to this the report said: "If it be true that the success of negotiations is greatly influenced by time and accidental circumstances, the importance to the negotiative authority of acquiring regular and secret intelligence cannot be doubted. The Senate does not possess the means of acquiring such intelligence. It does not manage the correspondence with our ministers abroad nor with foreign ministers here. It must therefore, in general, be deficient in the information most essential to a correct decision. The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to

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<sup>20</sup> *Executive Journal*, Vol. I, p. 150.

diminish that responsibility and thereby to impair the best security for the national safety. The nature of the transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch. A division of opinion between members of the Senate in debate on propositions to advise the Executive, or between the Senate and Executive, could not fail to give the nation with whom we might be disposed to treat the most decided advantages. It may be added that if any benefits be derived from the division of the legislature into two bodies, the more separate and distinct in practice the negotiating and treaty ratifying powers are kept, the more safe the national interests. The committee are therefore of the opinion that the resolution ought not to be adopted."<sup>21</sup>

It is certain that this statement of the objections in practice to the Senate's participation in the negotiation of treaties had thenceforth a strong influence in deterring that body from seeking to divide with the Executive the performance of this function, and in persuading the President that, in the negotiating of international agreements, there was no obligation upon his part, based either upon constitutional mandate or the requirements of expediency, to associate the Senate with himself, except when, for special reasons, he might deem it wise to do so. However, from time to time, since 1816, the Senate has, by resolutions, suggested to the President that he enter upon the negotiation of international agreements as to certain matters or along certain lines; and, upon his part, the President has occasionally asked the advice of the Senate and furnished it with advance information regarding pending or proposed international transactions.<sup>22</sup> Thus, in 1818, President Monroe asked the Senate whether he alone as Executive was constitutionally competent to arrange with Great Britain as to naval armaments upon the Great Lakes; and, if not, that they would give him advice as to the proper agreement with reference thereto that should be entered into. Again, in 1830, President Jackson asked the advice of the Senate as to the terms of a treaty to be negotiated with the Choctaw Indians. His message, however, bears evidence to the fact that he was aware that he was departing from the practice of years immediately preceding, though not from that of the early period. He said: "I am aware that in thus resorting to the early practice of the government, by asking the previous advice of the Senate in the discharge

<sup>21</sup> Compilation of Reports of the Committee on Foreign Relations, Vol. VIII, p. 24.

<sup>22</sup> For other instances in which during the early days, as well as at later times, the advice of the Senate has been asked by the President in the negotiation of international agreements, see Crandall, *Treaties: Their Making and Enforcement*, pp. 54 *et seq.*; an article in *Scribner's Magazine*, Jan., 1902, by Senator Henry Cabot Lodge, entitled "The Treaty-making Power," and the article by Prof. C. C. Tansill in the *American Journal of International Law*, Vol. XVIII, p. 459 (July, 1924) entitled "The Treaty-making Powers of the Senate."



of this portion of my duties, I am departing from a long and for many years unbroken usage in similar cases. But being satisfied that this resort is consistent with the provisions of the Constitution, that it is strongly recommended in this instance by considerations of expediency, and that the reasons which have led to the observance of a different practice, though very cogent in negotiations with foreign nations, do not apply with equal force to those made with Indian tribes, I flatter myself that it will not meet with the disapprobation of the Senate."<sup>23</sup>

In 1835 the Senate requested the President to open negotiations with the Central American governments with a view to securing treaties granting protection to such individuals as might undertake the construction of an interoceanic canal. In 1888, President Cleveland was requested by the Senate to open negotiations with China for the regulation of immigration of subjects of that country into the United States. In 1880, by a concurrent resolution, the Senate and House of Representatives requested the Executive to seek the coöperation of other Powers in providing for the amicable settlement by arbitration of disputes which could not be settled through the ordinary diplomatic channels. By an act of Congress, the President was, in 1902, advised and authorized to enter into certain treaty arrangements with reference to the construction of an interoceanic canal.

All of the instances cited above are, however, by way of general exception to the rule that the negotiation of treaties is in the hands of the President. The Senate's function, so far at least as its formal and final action is concerned, is limited to the disapproval, or ratification, with or without amendments, of the treaties after they have been agreed upon between the President and the chancelleries of the foreign countries concerned.

Though the formal participation of the Senate as a body in the negotiation of treaties is not often now solicited, as a matter of fact that body is, according to modern usage, frequently, indeed, it might be said, generally, kept well informed as to the progress of international negotiations by means of personal interviews between the Executive and prominent Senators, especially, of course, those serving upon the Committee on Foreign Affairs. In 1898 three of the five Commissioners appointed to negotiate the Treaty of Peace with Spain were Senators and members of this Committee.

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<sup>23</sup> "Secretary Webster, in the important negotiations which he conducted for the adjustment of the northeastern boundary kept the Senate advised of the progress of the negotiations and it was mainly for that reason he was able to carry the treaty by an overwhelming vote in the Senate which was politically hostile to the administration. Secretary Buchanan, before signing the treaty adjusting the Oregon boundary, submitted the full text to the Senate and received an informal note approving it. President Jackson even consulted the Senate as to the propriety of refusing to accept the award (under a treaty) of the King of the Netherlands, and procured a note of that body advising him as to the course to be pursued." (J. W. Foster in *XI Yale Law Journal*, 71.)

Nevertheless, this practice has not prevented frequent friction between the Senate and the Executive with reference to foreign relations. Especially has this been true since the time that Mr. Blaine held the position of Secretary of State. From the time when Monroe became Secretary of State in 1811 to the resignation of Mr. Blaine in 1892, with the exception of a very few years, this Secretaryship was held by men who had previously been in the Senate, but since then, with the exception of Sherman and Knox, this has not been true.<sup>24</sup> Speaking of the lack of harmony which has existed during this recent period, Professor Reinsch writes: "Under these circumstances, it is not surprising that there should have been more friction between the President and the Senate on foreign matters than existed during earlier years of our national life. Such constant friction as has during recent years existed between the Senate and the Department of State is, in fact, unprecedented in our national history. It began under Mr. Cleveland's régime, when the Olney-Pauncefote arbitration treaty was rejected, partly on account of the unpopularity of the Administration, partly on account of a strong political opposition to any arbitration arrangements with Great Britain. Even under McKinley, notwithstanding the unusual relations of friendliness between the President and the Senate, the most important treaties submitted by the Department of State were rejected or modified by the Senate. Again it proved impossible to have a British arbitration treaty ratified. The Hay-Pauncefote canal treaty failed, and this was also the fate of several important reciprocity treaties. . . . The Senate has continued this critical attitude with the result that no important treaty has been allowed to pass without such modification as has often entirely destroyed its original purpose. The only exception is the Treaty of Paris, in the formation of which individual senators had taken a prominent part. The Newfoundland reciprocity treaty was ruined through the interference of special interests."

In addition to these instances of disagreement, in 1905 came the disagreement between the Senate and Executive with reference to the general arbitration treaties which had been negotiated, and the irritation aroused in the Senate by the San Domingo protocol entered into by the President on January 20, 1905. Further reference to the principles involved in several of these disagreements will presently be made.

Occasionally the Senate has turned down projects to the approval of which it had earlier committed itself.

#### § 285. The Power of the Senate to Amend Treaties.

There would seem to be no question that, having the power either to approve or to disapprove an international agreement negotiated by the President, the Senate has also the power, when disapproving a proposed

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<sup>24</sup> Cf. Reinsch, *American Legislatures*, p. 95.

treaty, to state upon what conditions it will approve; in other words, to amend any treaty submitted to it.<sup>25</sup> Upon the other hand, it is equally within the province of the Executive to consider the amendment of the treaty by the Senate as equivalent to a rejection of it. When, therefore, a treaty has been amended in the Senate, it is within the President's power to abandon the whole treaty project, or to reopen negotiations with the foreign country or countries concerned with a view to obtaining their consent to the changes desired by the Senate, or, finally, to begin *de novo* and attempt to negotiate an entirely new treaty, which he may hope will secure senatorial approval. In case he decides to follow the second of these courses, namely, to secure the approval of the foreign country or countries to the amendments to the treaty project made in the Senate, and is successful in this, it would seem that the treaty need not again be submitted to that body for its approval, but may be at once promulgated.<sup>26</sup>

After the approval of the Senate has been obtained, a treaty becomes fully effective as between the nations parties to it, and, unless otherwise stated therein, as and of the date when signed, when ratifications have been exchanged between the Governments concerned.<sup>27</sup>

When, in 1795, the Jay treaty was submitted to the Senate for approval, that body, as has been already mentioned, advised the President to approve on condition that certain specified changes were made in it. These changes having been consented to by Great Britain the treaty was ratified without being again submitted to the Senate for its approval. The question as to the propriety of this course was submitted by Washington to the members of his cabinet and upheld by them. The same practice has been followed in subsequent cases. Where, however, the changes made in a treaty project have not been specifically indicated by the Senate as desired by that body, it has been very properly held that the amended project should be again submitted to the Senate for its action thereupon.<sup>28</sup>

The Senate's right to amend a treaty has been directly upheld by the Supreme Court. In *Haver v. Yaker* <sup>29</sup> the court said: "In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the

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<sup>25</sup> The approval or disapproval of a treaty project by the Senate is often spoken of as the ratification or refusal to ratify. Strictly speaking, however, this language is incorrect, as the ratification of a treaty is the final act performed by the President by which the agreement is declared in force between the United States and the foreign State or States which are the parties to it.

<sup>26</sup> Cf. Crandall, *Treaties: Their Making and Enforcement*, pp. 68 *et seq.*

<sup>27</sup> *Armstrong v. Bidwell* (124 Fed. 690).

<sup>28</sup> Crandall, pp. 68 *et seq.*

<sup>29</sup> 9 Wall. 32.

Senate, in whom rests the authority to ratify or approve it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it." <sup>30</sup>

**§ 286. Reservations to, or Interpretations of, Treaties by the Senate.**

In *New York Indians v. United States* <sup>31</sup> the court was called upon to interpret a treaty with the New York Indians which, when before the Senate, had been amended in several important respects by that body and its ratification made subject to certain reservations. The resolution containing this reservation did not, however, appear in the original nor in the published copy of the treaty nor in the proclamation of the President reciting the action of the Senate upon the treaty. The court for these reasons refused to consider the reservation a part of the treaty. The court said: "While this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. . . . The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement."

As to a Resolution passed by a majority of the Senate stating its purpose when ratifying the treaty terminating the Spanish-American War, the court said: "We need not consider the force and effect of a resolution of this sort. . . . The meaning of the treaty cannot be controlled by subsequent explanations of some who may have voted to ratify it." And, in the concurring opinion of Mr. Justice Brown it was said: "It cannot be regarded as a part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power." <sup>32</sup>

It has also been held that all protocols and explanations given by the Executive as to the meaning of treaty provisions which have not been passed upon and approved by the Senate, are not to be considered as binding upon the United States or enforceable in its courts. <sup>33</sup>

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<sup>30</sup> Senator Lodge enumerates sixty-eight treaties that were amended by the Senate and afterward ratified. Professor Tansill has, however, shown that there have been but fifty-seven treaties amended by the Senate and afterwards ratified by the President. A list of these treaties is given. See his article "The Treaty-Making Power of the Senate" in 18 *American Journal of International Law*, 459 (July, 1924).

<sup>31</sup> 170 U. S. 1.

<sup>32</sup> *Fourteen Diamond Rings v. United States* (183 U. S. 176).

<sup>33</sup> As to interpretations or reservations made by the President without the approval of the Senate, see Wright, *The Control of American Foreign Relations*, p. 47. However, see Chapter XXXIV as to certain international agreements that may be entered into by the President without submission to the Senate.

**§ 287. No Secret Treaties in the United States.**

It follows from what has been said that, under the American Constitution, it is not possible for the President to enter into binding treaties with foreign Powers which are not made known to the Senate. In 1900 Secretary of State Hay, replying to a resolution of inquiry of the House of Representatives, said: "The Secretary of State has the honor to say that there is no truth in the charge that a secret alliance exists between the Republic of the United States and the Empire of Great Britain; that no form of secret alliance is possible under the Constitution of the United States, inasmuch as treaties require advice and consent of the Senate, and, finally, that no secret alliance, convention, arrangement or understanding exists between the United States and any other Nation."<sup>34</sup>

It is none the less possible for the Executive to come to an understanding with a foreign Power, the exact terms of which are not made known to the Senate or to the American people, with regard to the manner in which that Power will exercise its control over matters with which the United States has a direct interest. For example, in 1907 there was entered into a so-called "gentleman's agreement" between the United States and Japan, according to which the Executive of the United States agreed not to urge upon Congress a policy of excluding Japanese immigrants, in view of an undertaking upon the part of the Japanese Government to adopt and enforce certain administrative measures that would check the emigration of Japanese laborers to the United States. The exact terms of this agreement were not made public until 1924, and, even then, the exact words of the agreement were not, and have not since been, published.<sup>35</sup>

**§ 288. Foreign States Held to a Knowledge of the Location of Treaty-Making Powers.**

Generally speaking, according to rules of international law, one State is not concerned with, and, therefore, not required to be cognizant of, the constitutional law of another State with which it has dealings. With respect, however, to the constitutional treaty-making powers of the governmental organs of that State, other States are required to be informed;—*qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus*—and, therefore, it is no valid ground of complaint on the part of a State, as, for example, England, in whose Executive is exclusively vested the treaty-making power, when a treaty project which has been mutually

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<sup>34</sup> H. R. Doc. 458, 56th Cong., 1st Sess., p. 2.

<sup>35</sup> The substance of the agreement was given in a letter from Mr. Hanihara, Japanese Ambassador to the United States, to Secretary of State Hughes, of April 10, 1924, and by him transmitted to the Senate at the time that it was considering the Immigration Law of 1924. See *Congressional Record*, April 11, 1924, p. 6271.

agreed upon between the Executive of that country and the Executive of the United States, fails of approval, or is amended in the Senate.<sup>36</sup>

It would seem, however, that when the American Senate amends a treaty, and then formally ratifies it as amended, and returns it to the President for him to submit to the other nation concerned, there is some ground for complaint that thereby such nation is improperly placed in a position where it is called upon to pass upon a project which has not been based upon negotiations between the two States in which opportunity has been given to state and argue the merits upon both sides of the project. In other words, that the onus of accepting or rejecting a completed project is thereby improperly placed upon the treaty-making organ of the foreign State. This would appear to have been the objection made by Lord Lansdowne in his note of February 22, 1901, to Lord Pauncefote, with reference to the Hay-Pauncefote treaty which in December, 1900, had been amended and then approved by the Senate. This treaty, it will be remembered, had for its aim the definite determination of certain matters which had been covered by the Clayton-Bulwer treaty, the subsisting force of which had been in dispute. The Senate's amendment to the new arrangement agreed upon between Secretary of State Hay and Lord Lansdowne, was amended by the Senate by the insertion of the statement that the Clayton-Bulwer treaty was "hereby superseded." Referring to this provision, Lord Lansdowne said: "The Clayton-Bulwer treaty is an international contract of unquestioned validity; a contract, which, according to well-established international usage, ought not to be abrogated or modified save with the consent of both the parties to the contract. His Majesty's Government find themselves confronted with a proposal communicated to them by the United States Government, without any previous attempt to ascertain their views, for the abrogation of the Clayton-Bulwer treaty."

#### § 289. Plenary Powers of Ratification.

Whether or not it is constitutionally possible for the President, the consent of the Senate having been obtained, to give to diplomatic agents full powers to ratify treaties negotiated by them and thus render them immediately effective without subsequent submission to the Senate, is doubtful. The point has never been passed upon by our courts; but it is quite possible that, should a judicial pronouncement upon this point be required, it would be held that for the Senate to commit itself in advance to whatever conditions the treaty negotiators might agree upon, would

<sup>36</sup> In order, however, to avoid the possibility of a misunderstanding and consequent irritation, it has been a common, though not uniform, practice to state explicitly in the powers granted those who are to negotiate a treaty, that their action, in order to become binding on the United States, requires the approval of the President and the Senate.

be the delegation of a power prohibited by that principle of our constitutional law, which declares that a power the exercise of which is delegated by the Constitution to a particular governmental organ may not be delegated by that organ to another department.

However this may be, the Senate and the President may, of course, give to their agents such powers and instructions as will hold them—the President and the Senate—morally bound to ratify what their plenipotentiaries have agreed to.

In earlier times writers upon International Law, Grotius, Puffendorf and Vattel, for instance, held that a State was absolutely bound by the treaties entered into by its agents when acting within the limits of their instructions. Later writers, however, generally hold that this ratification may, for strong and substantial reasons, be refused.<sup>37</sup>

Up to 1815 the general practice of the President was to obtain the approval of the Senate to the appointment of, and to the instructions given to, commissioners for the negotiation of contemplated treaties. Since that time, however, this practice has been seldom followed. This change has, however, not escaped occasional formal protest from the Senate.

After a treaty has been signed by the commissioners appointed to negotiate it, or agreed upon by the departments of State of the countries concerned, there is no constitutional obligation upon the President to submit it to the Senate, and, even after submission to that body, he may withdraw it, as for instance was done by President Cleveland with reference to a reciprocity treaty with Spain which had been sent to the Senate in 1884 by President Arthur. In a like manner the Hawaiian annexation treaty of 1893 and the Nicaraguan Canal Convention of 1884 were withdrawn "for reëxamination," after having been sent to the Senate.

Even after being favorably acted upon by the Senate, it would appear that, under certain circumstances, the President may refuse to ratify a treaty. Thus, in 1888, when China proposed certain changes in an agreement with this country which had already been approved by the Senate, the President abandoned the entire project.

#### § 290. Treaties Committing the United States to War under Certain Contingencies.

The Constitution definitely locates in Congress the right to declare war.<sup>38</sup> It has, however, been recognized by the Supreme Court that a state of war, at least in a domestic or civil sense, may come into existence without such a declaration,<sup>39</sup> and, in truth, in most if not all cases in which the

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<sup>37</sup> Crandall, pp. 12 *et seq.*

<sup>38</sup> Art. I, Sec. 8, Cl. 11. For a further discussion of the power to declare war, see §§ 1026, 1027.

<sup>39</sup> Prize Cases (2 Black, 635).

United States has been involved as a party belligerent with foreign Powers, the congressional declaration has taken the form of an assertion that a condition of war has been created by the acts of those other Powers.<sup>40</sup>

It may be observed that "acts of war" and a "state of war" have not the same meaning. An act of war is one that can only be justified when a state of war exists, and, therefore, its commission justifies the injured State in declaring war against the offending State. But such an act does not *ipso facto* create war. This distinction became a very important one when, in the summer of 1923, Italy bombarded and took military possession of the Island of Corfu.

Whether or not it is constitutional for the United States to enter into a treaty whereby it absolutely commits itself to waging war under certain circumstances, that is, whether or not such an engagement would be an attempt of the Government through an exercise of the treaty-making power to make a decision which, by the Constitution, is committed to Congress, was discussed in Congress and in the public press in connection with the proposal that the United States should, by becoming a member of the League of Nations, assume the obligations imposed by the Covenant upon which that League is based; and also in connection with the proposed treaty between France and the United States whereby the United States was to "be bound to come immediately to her [France's] assistance in the event of any unprovoked movement of aggression against her being made by Germany."

Although doubts were expressed as to the constitutionality of such a treaty commitment, and to the commitments of the Covenant of the League of Nations with reference to the waging of war by the parties thereto, under the contingencies specified, it would seem that there was no valid basis for such doubts. An agreement to declare and wage war, and a declaration of war, are distinct and different acts. Thus, the United States may, by a treaty, pledge its faith that it will, under given circumstances go to war, but the arising of those circumstances cannot operate, of themselves, that is, *ipso facto*, to place the United States in a state of war. For that a declaration or recognition of a state of war by Congress is necessary, and this is true even when, as in the case of the Covenant of the League of Nations it is declared that "Should any member of the League resort to war in disregard to its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League which hereby undertake immediately to

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<sup>40</sup> In the Joint Resolution of April 6, 1917, it was declared: "Whereas the Imperial German Government has committed repeated acts of war against the Government and people of the United States: therefore, be it resolved, that the state of war between the United States and Germany which has thus been thrust upon the United States is hereby formally declared." 40 U. S. Stat. at L. 1. The Joint Resolution of December 7, 1917, with reference to Austria-Hungary was substantially similar.



subject it to the severance of all trade or financial relations, etc.”<sup>41</sup> In any such, or other, case the United States would not find itself at war until Congress has so recognized or declared it.<sup>42</sup>

It may, then, be confidently stated that, in its extent, the treaty-making power of the United States is broad enough to enable the United States to enter into any form of political alliance, offensive or defensive, which other sovereign Nations are qualified to enter into. In this connection may be quoted the language of the Supreme Court in *Hauenstein v. Lynham*:<sup>43</sup> “The word ‘treaties’ is nomen generalissimum and will comprehend commercial treaties, unless there be a limit upon it by which they are executed. It is the appellative, which will take in the whole species, if there be nothing to limit its scope. There is no such limit. There is not a syllable in the context of the clause to restrict the natural import of its phraseology. The power is left to the force of the generic term and is therefore as wide as a treaty-making power can be. It embraces all the varieties of treaties which it could be supposed this Government could find it necessary or proper to make, or it embraces none. It covers the whole treaty-making ground which this Government could be expected to occupy, or not an inch of it. It is a just presumption that it was designed to be co-extensive, with all the exigencies of our affairs. Usage sanctions that presumption—expediency does the same. The omission of any exception to the power, the omission of the designation of a mode by which a treaty not intended to be included within it might otherwise be made, confirms it.”

#### § 291. Arbitration Treaties of 1911.

In 1911, President Taft submitted to the Senate for its approval treaties that had been negotiated with Great Britain and France according to Article I of which “All differences hereafter arising between the High Contracting Parties, which it has not been possible to adjust by diplo-

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<sup>41</sup> Article 16, Cl. 1.

<sup>42</sup> It may be observed that the United States has, upon a number of occasions, entered into engagements which, under conditions that may arise, will make it necessary for the United States to go to war, unless it is willing to repudiate its covenanted word. For example, in a treaty entered into in 1904 with the Republic of Panama it is provided that “The United States guarantees and will maintain the independence of the Republic of Panama.” This can only mean that if this independence is seriously threatened, the United States will, if necessary, wage war to protect it.

In the *Prize Cases* (2 Black, 635) as earlier noted, it was held that a civil war may exist without a congressional declaration, and be recognized as such by the President. The court made also the *obiter* statement that, by foreign invasion, a foreign war also might, by presidential action, be recognized to exist. Even if this be a correct doctrine (which the author doubts) it still remains true that the United States cannot find itself at war without some official act upon its own part,—presidential or congressional.

<sup>43</sup> 100 U. S. 483. The language of the court is itself taken from a speech of William Pinkney of Maryland in the House of Representatives.

macy, relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at the Hague by the Convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement." And, furthermore, that, "in cases in which the Parties disagree as to whether or not a difference is subject to arbitration under Article I of this Treaty, that question shall be submitted to the Joint High Commission of Inquiry; <sup>44</sup> and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this Treaty."

When referred to the Committee on Foreign Relations of the Senate, the Committee struck out this last clause upon the ground, *inter alia*, that its effect would be to invade the constitutional prerogative of the Senate to determine in every specific case whether or not a controversy was subject to arbitration. The Committee in its majority report, said: "It will be seen . . . that if the Joint Commission, which may consist of one or more persons, which may be composed wholly of foreigners or wholly of nationals, decides that the question before them is justiciable under Article I it must then go to arbitration whether the treaty-making power of either country believes it to be justiciable or not. A special agreement, coming to the Senate after the joint commission had decided the question involved to be justiciable, could not be amended or rejected by the Senate on the ground that in their opinion the question was not justiciable and did not come within the scope of Article I. By this clause the constitutional powers of the Senate are taken away *pro tanto* and are transferred to a commission, upon the composition of which the Senate has no control whatever. . . . The Senate is deprived of constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The Committee believe that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the Committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power." <sup>45</sup>

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<sup>44</sup> The Commission was provided for in Article II of the treaties.

<sup>45</sup> Sen. Doc. 98, 62d Cong., 1st Sess. Dissent to the view thus expressed was made by Senator Raynor of Maryland, a member of the Committee. For a further defence of the Committee's view see the speech of Senator Lodge in the Senate, on February 29, 1912, and issued as Sen. Doc. 353, 62d Cong., 2d Sess.

It would seem that the Senate Committee here took a very narrow view of its own right to determine the manner in which, for the future, a decision should be reached as to whether or not questions were or were not justiciable, and therefore properly arbitrable. According to the proposed treaties this determination was to be made in accordance with the terms agreed upon by the Senate acting in its treaty-making capacity. It seems difficult, therefore, to see grounds for the Senate's objection to the treaties beyond that based upon policy, namely, as to whether it would be wise thus to agree in advance to the arbitration of all questions that the Joint High Commission might hold to be arbitrable. The constitutional ground appears not to have been well taken.<sup>46</sup>

Because of the amendments to the treaties insisted upon by the Senate, the President refused to ratify them when they were returned to him by the Senate.

#### § 292. Peace by Joint Resolution of Congress Instead of by Treaty.

As a rule wars between foreign Powers are terminated by treaties of peace. However, international lawyers recognize, and history furnishes examples of the fact, that such wars may come to an end either by the total extinction of one of the belligerent parties, or by the permanent cessation in fact of all military operations.<sup>47</sup>

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<sup>46</sup> By the statute enacted in 1872 it was provided that the Postmaster General might, with the advice and consent of the Senate, and for the purpose of making better postal arrangements with foreign countries, "negotiate and conclude postal treaties or conventions." It was argued that this furnished a precedent for the delegation of authority provided for in the treaties of 1911, but this was not so. The delegation was here one made by statute, and from the beginning of the government it had been recognized that the matter of postal affairs, domestic and foreign, was one to be determined by Congress acting under its postal and commercial powers. The use, however, of the term "treaties" in the statute was a misleading one, for such agreements as the Postmaster General might arrive at with foreign authorities for harmonious and reciprocal action as to postal matters, could not properly be spoken of as treaties. As to this see the speech of Senator Lodge referred to in the preceding footnote.

<sup>47</sup> "War may be terminated in three different ways: Belligerents may (1) abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty, or (2) belligerents may formally establish the condition of peace through a special treaty of peace, or (3) a belligerent may end the war through subjugation of his adversary." (Oppenheim, *International Law*, 2d ed. Vol. 2, p. 322.)

"There are three ways of terminating hostilities between States, namely, (1) by a mere cessation of hostilities of both sides, without any definite understanding supervening; (2) by the conquest and subjugation of one of the contending parties by the other so that the former is reduced to impotence and submission; (3) by a mutual arrangement embodied in a treaty of peace whether the honors of war be equal or unequal.

Under the first mode the relationship between the parties remains in a condition of uncertainty, and, owing to the numerous difficulties involved, combatant States have very seldom resorted to this method of withdrawing from the war without arriving at

However, the question whether a status of peace has replaced that of war, is a different question when viewed municipally or constitutionally, from what it is when viewed internationally, and thus it may be that, *ipso facto*, or as an international proposition, a war may have ceased, although, as a municipal or constitutional proposition, it still continues. This was the situation in the United States as regarded Germany and Austria-Hungary after the Armistice of November 11, 1918, and until formal treaties of peace were entered into between the United States and those countries.

After the United States Senate had refused to approve the treaty of peace with Germany which had been drafted at Paris, and which the other Allied and Associated Powers, with the exception of China, signed at Versailles, the question was raised whether or not, as a municipal proposition, the war might not be declared legally at an end by means of a Joint Resolution of the two Houses of Congress. Such Resolutions were introduced and referred, in the House, to the Committee on Foreign Affairs, and, in the Senate, to the Committee on Foreign Relations. Both Committees reported back their several Resolutions with majority and minority reports, agreeing and refusing respectively to recommend their passage.<sup>48</sup>

In support of the view that Congress, as distinguished from the Senate and President acting as the treaty-making power, might, by its action, bring the war to a legal close, it was argued that, since to that body belongs exclusively the constitutional power to declare war, it should logically be held to have the implied power to do what will, in effect, amount to a repeal of such a declaration. Such an argument is absolutely valid, provided it be understood that such congressional action can have no further than a municipal effect, that is, to bring to an end those municipal legal consequences which follow from the existence of a status of war. In other words, such a legislative act is not competent to determine the international legal relations of the United States with the other belligerent Powers. These can be fixed only by means of international agreements negotiated

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some definite and intelligible decision." (Phillipson, *Termination of War and Treaties of Peace*, p. 3.)

"It is certain that a condition of war can be raised without any authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." (Mr. Seward, Secretary of State, July 22, 1868, *Dip. Cor.*, 1868, Vol. 2, pp. 32 to 34, cited Moore's *International Law*, Vol. 7, p. 336.)

<sup>48</sup> The Resolution, in the form in which the two Houses agreed upon it, was passed by both Houses, but vetoed by President Wilson. It was later again passed by both Houses and signed by President Harding on July 2, 1921.

by the President and approved by the Senate of the United States, and agreed to by the other States concerned.<sup>49</sup>

§ 293. The "Recognition" of Foreign Governments.

The recognition by the United States of a status of belligerency, and the recognition of the sovereignty and independence of a foreign government are political acts, not subject to judicial review<sup>50</sup> and are performed by the President. At times the claim has been made that this power of recognition is one to be exercised at the dictation of Congress, but precedents are against the claim.<sup>51</sup> It is to be presumed, however, that when the recognition of a status of belligerency or of the independence of a revolutionary government is likely to constitute a *casus belli* with some other foreign power, the President will be guided in large measure by the wishes of the legislative branch. Upon the other hand, it is the proper province of the Executive to refuse to be guided by a resolution on the part of the legislature if, in his judgment, to do so will be unwise. The legislature may express its wishes or opinions, but may not command.<sup>52</sup>

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<sup>49</sup> Of course Congress could, by the exercise of its legislative control of foreign commerce, fix by statute matters of trade with such foreign States.

The view expressed in the text is not in agreement with that of Professor Wright (*The Control of American Foreign Relations*, p. 293), who, it is to be observed, fails to distinguish between the establishment of peace as an international proposition, which may be effected by a treaty or by executive act, and the restoration of peace as a municipal status, which can be effected by legislative action.

<sup>50</sup> See Sen. Doc. 40 and 56, 54th Cong., 2d Sess.; Hinds' *Precedents of the House of Representatives*, Chapters XLVIII and XLIX.

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<sup>52</sup> For a fuller discussion of the principles governing the "recognition" of States or of their Governments, see Willoughby, *Fundamental Concepts of Public Law*. For an excellent discussion of the various occasions upon which members of Congress have raised in Congress the question whether recognition of foreign governments might not result from congressional action, see the article by Professor C. A. Berdahl, "The Power of Recognition," in 14 *American Journal of International Law*, 519.

## CHAPTER XXXIV

### INTERNATIONAL AGREEMENTS WHICH DO NOT REQUIRE THE APPROVAL OF THE SENATE <sup>1</sup>

#### § 294. International Agreements Not Requiring Approval by Senate.

As has been seen, all treaties to which the United States is a party, in order to become legally binding upon the United States and enforceable in its courts, require, at some stage of their negotiation, the approval of the Senate as manifested by a vote of two-thirds of its members present when the approval is given.<sup>2</sup> Not all agreements entered into by the United States with foreign powers are held to be treaties in the sense in which that term is used in the treaty clause of the Constitution. Such agreements as are held not to be treaties in this sense, it has been the practice of the President, acting in pursuance of his general powers as Chief Executive or as authorized by congressional statute, to enter into and promulgate without submission to the Senate. Furthermore, in not a few instances the Senate has itself expressly conferred upon the President the power to contract with foreign powers with reference to specified matters.

This power, then, of the President to enter into international arrangements free from the necessity of obtaining the subsequent approval of the Senate may be treated under the following heads:

1. His power inherent in him as the Chief Executive and commander-in-chief of the army and navy,
2. His power as granted to him by statute,
3. His power as delegated to him by the Senate, the co-possessor with him of the treaty-making power.

#### § 295. International Powers of the President as Chief Executive: International Correspondence.

International correspondence is exclusively in the hands of the President, or his agent, e. g., the Secretary of State.<sup>3</sup> Hence it is improper for any

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<sup>1</sup> Upon this subject see the pamphlet entitled "International Agreements Without the Advice and Consent of the Senate," by Mr. James F. Barnett, reprinted, with additions, from the *Yale Review*; the article by Hon. J. B. Moore in the *Political Science Quarterly* for September, 1905, entitled "Treaties and Executive Agreements"; and the article by Mr. C. C. Hyde in the *Greenbag* for April, 1905, entitled "Agreements of the United States other than Treaties."

<sup>2</sup> Only the final vote of approval or to postpone indefinitely requires the two-thirds vote. For all other parliamentary motions with reference to a treaty, a simple majority is sufficient.

<sup>3</sup> Communications between the States of the Union and the Federal Government are

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international documents to be addressed to, or sent directly to the Senate, or for any attempt to be made, in any way, by an agent of a foreign power to influence directly the action of the Senate upon a treaty that is pending before it or is later to be sent to it for its action thereupon. Upon the other hand, it is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President. Thus, when in 1877 Congress passed two joint resolutions congratulating the Argentine Republic and the Republic of Pretoria upon their having established a republican form of government, and directing, in the one case, the Secretary of State to acknowledge the receipt of a despatch from Argentine, and in the other to communicate with Pretoria, the President vetoed both resolutions.<sup>4</sup>

By virtue of the power exclusively vested in him to conduct diplomatic negotiations between this and foreign countries, the President has, since early years, entered into numerous agreements with foreign chancelleries for the settlement of claims made by private American citizens against foreign governments.<sup>5</sup> In a considerable number of cases, these claims have been settled by means of arbitration agreed upon between the foreign offices concerned. After describing the various instances of executive action under this head, Professor Moore says: "It thus appears that, if we include only the more formal settlements, there have been thirty-one cases in which claims against foreign governments have been settled by executive agreement, and that twenty-seven arbitrations have been held under such agreements as against nineteen under treaties, where the settlement embraced claims against the foreign government alone and not against the United States."<sup>6</sup>

In no case has the President attempted, without consulting the Senate, to adjust finally claims brought by foreigners against the United States.<sup>7</sup> In no case, also, has the President, by executive action, attempted the settlement of claims set up by the United States in its own behalf.

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made through the Secretary of State and not through the President. This rule was, however, several times disregarded by President Roosevelt.

<sup>4</sup> Richardson's *Messages and Papers of the President*, VII, 430.

<sup>5</sup> An especially interesting case was that of the Mora claim. For an account of this by Professor J. B. Moore, see the *Political Science Quarterly*, XX, pp. 403 *et seq.*

<sup>6</sup> *Political Science Quarterly*, XX, p. 414.

<sup>7</sup> In two instances claims of foreigners against the United States were submitted to arbitral tribunals by executive agreement, but in both instances it was expressly provided that any awards that might be made should be a claim not against the United States, but solely against the estates of certain American citizens whose estates were to be adjusted before the same arbitral tribunals. Cf. *Greenbag*, XVII, 233, Article "Agreements of the United States Other than Treaties."

**§ 296. Protocols.**

The term "Protocol," as used in International Law, has ascribed to it several meanings. The two most common of these meanings are:

1. As describing the records of the meetings of commissioners for the negotiation of a treaty. These records, though, of course, not parts of the treaty finally entered into, are often of value for the interpretation of such treaty.

2. As describing an agreement reached between the foreign offices of two countries, which has been reduced to definite written statement, but has not been ratified as a treaty by the States parties to it. How far such agreements, though not legally binding, morally bind the parties to them, depends upon the particular circumstances of each case.

The most common use to which protocols in this sense are put, is in fixing the general terms in which a final treaty—especially a treaty of peace—is to be negotiated. An example of this is the protocol of 1898 providing for the appointment of a commission to negotiate the Treaty of Peace with Spain.<sup>8</sup>

The constitutional authority of the President without consulting the Senate to enter into protocols of agreement as the bases for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate.<sup>9</sup>

The protocol signed by the allies (the United States being among their number) at Peking in 1901 after the Boxer troubles, though in the nature of a military convention, providing as it did for the withdrawal of the allied forces from Peking, was yet practically of a treaty character. It provided for the payment of indemnities by China, for an international commission to receive and distribute these indemnities, the prohibition of the importation into China for two years of arms and ammunition, the delimitation of the legation quarters in Peking, and for various reforms and concessions on the part of China. Commenting upon this protocol, Mr. Barnett observes: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character. As has been pointed out above, purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."

In the case of the Boxer Protocol, no serious objection was made to the

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<sup>8</sup> 39 U. S. Stat. at L. 1742.

<sup>9</sup> For instances of protocols, see Butler, *The Treaty-Making Power*, II, p. 371, note.

President's failure to adjust the questions involved by means of a treaty submitted to the Senate for its approval. When, however, in January, 1905, President Roosevelt entered into a protocol agreement with San Domingo for the administration of its customs with a view to providing for the adjustment and payment of foreign creditors of that country, it was immediately urged, upon the fact becoming known, that the action contemplated was one which could be authorized only by a treaty which would have the approval of the Senate. Though the protocol of January 20th made no reference to the Senate's approval being necessary to its validity, and contained the provision that it was to go into effect on February 1st, the President disclaimed the purpose of entering into the arrangement without first obtaining the Senate's consent. The protocol, in amended form, expressly providing for the Senate's approval, was submitted to that body, but upon that body's failure to act upon it, the President, acting upon his own responsibility, was able to secure, informally, substantially the end aimed at by the protocol. A treaty governing the subject was finally approved by the Senate and ratified by the Dominican Government.

#### § 297. *Modi Vivendi*.

As the term indicates, a *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doctrine that these *modi vivendi* may be entered into by the President without consulting the Senate.<sup>10</sup>

#### § 298. International Agreements Entered into by the President under His Military Powers.

In the exercise of his powers as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A conspicuous example of international agreements thus entered into is the protocol signed at Peking in 1901, to which reference has already been made. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners, etc.

The President's military powers exist in times of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and

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<sup>10</sup> For instances of *modi vivendi*, see Butler, *ibid.*, I, p. 369, note.

consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes. So also, upon his own discretion, the President is able to send American vessels of war to whatever ports he sees fit, whether for the purpose of friendly visit, of furnishing protection to American citizens or their property, or of making a "demonstration" in order to obtain desired action on the part of the State thus overawed.

**§ 299. International Agreements Entered into, or Action Taken by the President, by Virtue of Authority Granted Him by Treaties Previously Ratified.**

The preceding sections have considered the power of the President to enter into international agreements, and to take action with reference to matters of an international character, by virtue of powers inherent in him either as the Chief Executive of the Nation or as constitutional Commander-in-Chief of the army and navy. We turn now to a consideration of treaty-making powers which may constitutionally be exercised by him, without in each instance obtaining the advice and consent of the Senate, by virtue of general authority given to him in treaties previously entered into and approved by the Senate.

This question, which is one of both political expediency and constitutional law, received thorough discussion both in Congress and the press in connection with the general treaties of arbitration which were agreed upon in 1904 and 1905 between Secretary of State Hay in behalf of the United States, and the foreign ministers of various other countries.

At The Hague Conference in 1899 an attempt was made to provide for obligatory arbitration in certain cases. This failed, but by Article XVI it was declared that: "In questions of a judicial character, and especially in questions regarding the interpretation and application of international treaties or conventions, arbitration is recognized by the Signatory Powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods"; and Article XX provided for the establishment of "a permanent Court of Arbitration, accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with rules of procedure included in the present convention," to which resort might be had for the settlement of disputes which diplomatic methods had failed to adjust. In addition to these provisions, by Article XIX of The Hague Convention the Signatory Powers have reserved the right to enter into general or particular treaties providing for obligatory arbitration with reference to such subjects as they might think advisable.

In 1903, by a treaty signed at London, October 14th, France and England agreed in the future to submit to The Hague Tribunal certain speci-

fied classes of questions. Article II provided that "*Dans chaque cas particulier, les Hautes Parties Contractantes, avant de s'adresser à la Cour permanente d'arbitrage, signeront un compromis spécial, déterminant l'objet du litige, l'entendue des pouvoirs des arbitres.*" This Anglo-French treaty became the model for a number of treaties between other European nations, as well as for ten arbitration treaties negotiated by Mr. Hay in 1904-1905, and submitted to the Senate for its approval.

The first two articles of these treaty projects read as follows:

"Article I. Differences which may arise of legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties."

"Article II. In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure."

In the Senate objection developed to the provision that the definition of the matter in dispute and the fixing of the powers of the arbitrators should be "by special agreements," which, the terminology would imply, might be entered into, in each case, by the President without consulting the Senate. That body, therefore, amended the treaty projects by substituting the word "Treaty" for the word "Agreement." The effect of this change was, of course, to make it necessary to obtain the approval and consent of the Senate to each and every proposition that might thereafter arise for submitting a dispute to arbitration, even when such propositions were clearly within the scope of Article I of the treaties which Secretary Hay had negotiated. President Roosevelt holding that thus, in any event, a special treaty would have to be negotiated and approved by the Senate before a matter could be submitted to arbitration, declared that the ratification of the so-called general arbitration treaties which the Senate had amended, would achieve nothing, and declined to submit them, as thus amended, to the foreign countries concerned, for their approval, and the whole project was, for the time being at least, abandoned.

With the policy or impolicy of the Senate's refusal explicitly to endow the Executive with the authority by "special agreements" to submit to arbitration before The Hague tribunal of matters coming within the terms of the ten arbitration treaties negotiated by Secretary Hay, a treatise on Constitutional Law is not concerned. As regards, however, the point made by some of the Senators that the delegation of such authority to the President would not be constitutional, it may be said that both judi-

cial precedents and previous practice of the Senate itself support in principle the treaties in question.

There have been numerous instances in which the Senate has approved treaties providing for the submission of specific matters to arbitration, leaving it to the President to determine exactly the form and scope of the matter to be arbitrated and to appoint the arbitrators. Professor J. B. Moore, in the article to which reference has already been made, enumerates thirty-nine instances in which provision has thus been made for the settlement of pecuniary claims. Twenty of these were claims against foreign governments; fourteen were claims against both governments, and five against the United States alone.<sup>11</sup>

Notwithstanding the defeat of the Hay treaties in 1905, the President still has, by virtue of The Hague Convention itself, a considerable power upon his own initiative of referring many matters of international dispute to the Permanent Court of Arbitration at The Hague or to arbitral commissions specially created, as provided for in that instrument. As we have already seen, the President, by reason of his control of all diplomatic relations, has considerable power to refer to arbitration matters of dispute which he is unable to settle through the ordinary diplomatic channels. And, in the exercise of this discretion, he can, of course, refer claims, especially those of a pecuniary nature, and questions of treaty interpretation to the tribunals established or provided for by The Hague Convention. Thus, without consulting with the Senate, he referred the Pious Fund controversy with Mexico to The Hague Tribunal.<sup>12</sup>

Aside from any other treaty agreements, there seems to be some question as to the extent of the President's powers under The Hague Convention. Ex-Secretary of State John W. Foster has said: "I apprehend that should our government decide to refer any dispute with a foreign government to The Hague Tribunal, President Roosevelt, or whoever should succeed him, would enter into a convention with the foreign government, very carefully setting forth the question to be arbitrated, and submit that convention to the Senate for its advice and consent. If I read the Constitution of the United States and The Hague Convention aright, such would be the only course permissible by those instruments."<sup>13</sup>

To much the same effect is the declaration of Mr. F. W. Holls, who was the Secretary to The Hague Conference. He says: "The appointment of a Commission of Inquiry having no further necessary consequences

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<sup>11</sup> *Political Science Quarterly*, XX, 403.

<sup>12</sup> It is to be observed, however, that at the time the Pious Fund matter was, by the President, with the consent of Mexico, referred to The Hague Tribunal there was a subsisting treaty between this country and Mexico—a treaty which, of course, had had the approval of the Senate—providing for arbitration of disputes of the character of the Pious Fund.

<sup>13</sup> *Yale Law Journal*, XI, p. 69.

than the providing for each party's share of necessary expenses, would seem to be within the ordinary diplomatic functions of the President and the Department of State by memorandum or protocol, whereas an agreement to submit any question to a court of arbitration, the decision to be binding upon the parties, must necessarily take the form of a treaty requiring the constitutional co-operation of the Senate."<sup>14</sup>

Upon the other hand, Judge Simeon E. Baldwin gives as his opinion that: "The Hague Convention, when ratified by the Senate, became thus a standing warrant or, so to speak, a power of attorney, from the United States to the President, to submit such international controversies as he might think fit to the ultimate decision of the International Court of Arbitration."<sup>15</sup>

**§ 300. International Agreements Entered into, or Action Taken by the President, by Virtue of Authority Granted Him by Congressional Statute.**

In many instances Congress has, by statute, authorized the Executive to perform acts of an international character, that is, acts with which other countries have been directly concerned. Under such authorization, numerous international postal arrangements have been entered into. Thus by act of 1872, Congress declared that "for the purpose of making better postal arrangements with foreign countries," the Postmaster-General, acting under the advice of the President, might "negotiate and conclude postal treaties."

In a similar manner, that is, under congressional sanction, the President has negotiated and entered into agreements with foreign countries with reference to copyrights and trade-marks.

Various other congressional acts of this character, as, for example, that of 1901, whereby the President was authorized to lease coaling stations from Cuba, might be mentioned, but the most important of these and the only ones which need discussion are those authorizing action with reference to the tariff laws.

Since the first years under the Constitution, Congress has pursued the policy of giving to the President a considerable executive discretion in the application and enforcement of its laws governing commercial intercourse with foreign countries. Of this character was the Embargo Act of 1794, the act of 1799 governing commercial intercourse with France, the Non-importation Act of 1806, the Non-intercourse Acts of 1809 and 1810, the acts of 1815 and 1830 as to tonnage and other dues, the act of 1866 as to the non-importation of cattle and hides, and the acts of 1815, 1824, 1828, 1886, 1888 and 1897 with reference to the suspension of discriminat-

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<sup>14</sup> *The Peace Conference at The Hague*, p. 216.

<sup>15</sup> *Yale Review*, IX, p. 415.



ing duties.<sup>16</sup> All of these acts provided that whether or not they should go into effect should be at the discretion of the President.

By section 3 of the act of 1890 (the so-called McKinley Act) it was provided: "That with a view to securing reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions, upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country, as follows."

This section had been put in the McKinley Act with a view to securing reciprocal commercial agreements with foreign powers, and ten such tariff arrangements were effected by the President by means of an exchange of diplomatic notes simply. These agreements remained in force until the enactment in 1894 of the Wilson-Gorman Act.

The constitutionality of this action under the act of 1890 was contested on the ground that it amounted to a delegation by Congress to the President of a portion of its legislative power; but the Supreme Court in *Field v. Clark*<sup>17</sup> held the provision valid.<sup>18</sup>

By the third section of the Tariff Act of 1897 (the Dingley Act), the President was authorized to enter into reciprocity agreements with foreign countries with respect to certain enumerated articles, whereby in return for concessions obtained from other countries, equivalent concessions were to be granted by the United States. Under the authority thus granted a number of reciprocity agreements were negotiated and promulgated by the President.

Section 4 of this act of 1897 also provided for reciprocity treaties which should be approved by Congress. This section will receive later consideration.<sup>19</sup>

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<sup>16</sup> Cf. J. B. Moore in *Political Science Quarterly*, XX, p. 395.

<sup>17</sup> 143 U. S. 649.

<sup>18</sup> See Chapter LXXXIX in which the delegation of legislative power is discussed.

<sup>19</sup> There have been some instances of international agreements entered into by the President without the advice and consent of the Senate, and without authorization by some previous treaty or statute, which cannot be grouped under any one of the pre-



**§ 301. Extradition.**

The greatly preponderant weight of opinion is that, in the absence of authority expressly given him by treaty or statute, the President has not the constitutional right to extradite to a foreign country a fugitive to this country.<sup>20</sup> The single instance in which the President has extradited without such authority expressly conferred upon him is the surrender to Spain by Lincoln in 1864 of one Arguelles.

Whether or not Congress has the power by statute to authorize the President to extradite fugitives to countries with which the United States has no subsisting treaty upon the subject is not certain, as there has been no instance of the exercise of such power. Reasoning upon general principles, however, there would seem to be no constitutional objection to such legislation.<sup>21</sup>

**§ 302. Lansing-Ishii Agreement.**

In 1917 the so-called Lansing-Ishii agreement was entered into between the American Secretary of State and the representative of the Foreign Office of the Japanese Empire, embodied in an exchange of letters according to which the two Governments stated their mutual understanding as to the so-called "special rights" which Japan was recognized to have in China, and as to the maintenance of the "open door" in commercial dealing with that country, and with the maintenance of its territorial integrity and sovereignty.

As an international proposition it was generally accepted, though it would seem upon not very good grounds, that this agreement or understanding did more than commit the administration that made it to the policies therein stated, and operated as a continuing obligation upon the part of the United States. It would seem clear, however, that the agreement thus entered into should have been held politically or morally binding only upon the President with whose approval it was made, and as voicing nothing more than an announcement to the Japanese Government of the policy by which he and his administration intended to be guided in the premises, and that, as such, it could not properly be deemed by the Japanese Government a breach of faith upon the part of the United States should a

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ceding heads mentioned in this chapter. Thus, for example, in 1850 Great Britain ceded to the United States a reef in Lake Erie upon condition that the United States would engage to erect thereupon a lighthouse and maintain it, and agree to erect no fortifications thereupon. This engagement the President made without consulting the Senate, and the cession was made, and later, Congress having appropriated the funds, a lighthouse was constructed. See Malloy, *Treaties and Conventions between the United States and Other Powers*, Vol. I, p. 663, for "Protocol of a Conference held at the Foreign Office, December 9, 1850, Ceding Horse-Shoe Reef to the United States."

<sup>20</sup> Cf. Moore, *Extradition*.

<sup>21</sup> Cf. Butler, § 435.

succeeding President or national administration declare that its policies would be different. In 1918, testifying before the Committee on Foreign Relations of the United States Senate, Secretary of State Lansing, when asked: "Has the so-called Lansing-Ishii agreement any binding force on this country?" replied that it had not; and, when further asked whether it was not, then, simply a declaration of his policy or that of the American Government so long as the President or State Department might desire to continue that policy, replied: "Exactly, in the same way that the Root-Takahira agreement is."<sup>22</sup>

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<sup>22</sup> *Hearing Before the Committee on Foreign Relations, The Treaty of Peace with Germany*, 1919, Government Printing Office, pp. 139-253.

The Root-Takahira Agreement was one entered into in 1908 between the American Secretary of State and the Japanese Ambassador at Washington with regard to the maintenance of the *status quo* in the Pacific Ocean, and the defence of the principle of equal opportunity for commerce and industry in China.

On April 14, 1923, by an exchange of notes between the Japanese Ambassador to the United States and the American Secretary of State, the Lansing-Ishii agreement was declared to be "cancelled and of no further force or effect."

## CHAPTER XXXV

### CONGRESSIONAL LEGISLATION FOR THE ENFORCEMENT OF TREATIES

#### § 303. Treaties and the Law of the Land.

In most countries, other than the United States, treaties or other international agreements are purely international in character and do not operate to create municipal law for the countries parties to them. This is not the case in the United States, for it is expressly declared by the Constitution that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>1</sup>

There is little doubt that the primary purpose of this provision, as the last clause shows, was to make indubitable the supremacy of treaties over State statutory or constitutional provisions. However, as is elsewhere fully discussed, it has, from the beginning, been held that treaties, so far as they are self-executory, operate in the United States, by virtue of this constitutional provision, to create municipal law which the courts are called upon to recognize and apply. The only question, then, in this regard, is as to when, and to what extent, specific treaty provisions are to be regarded as self-executory.

The classical statement as to the municipal law-creating force of treaties under American constitutional law is that of Chief Justice Marshall in *Foster v. Neilson*,<sup>2</sup> in which the plaintiff relied, in part, upon a treaty provision to sustain his claim to recover a tract of land. The Chief Justice, in his opinion, said: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial depart-

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<sup>1</sup> Art. VI, Cl. 2.

<sup>2</sup> 2 Pet. 253.

ment; and the legislature must execute the contract before it can become a rule for the court.”<sup>3</sup>

#### § 304. Treaties Cannot Appropriate Money.

It is established that, though the treaty-making power is able to obligate the United States internationally to the payment of sums of money, it is not able itself to appropriate from the United States treasury the amounts called for, or compel the legislature to provide for their payment.

The question as to the obligation of Congress, morally or legally, to appropriate moneys, the payment of which by the United States is called for by agreement entered into with foreign countries by the treaty-making power, arose in 1796 in connection with Jay's treaty, which had been negotiated in 1794 and ratified in 1795. The treaty having been communicated to the House of Representatives in order that the moneys called for by it might be appropriated, Gallatin and other members urged that the House, before passing the appropriation asked for, was entitled to see all the papers in the executive department relating to the treaty in order that it might then pass upon the question on its merits, and refuse or consent to the appropriation as should to the House seem fit. A resolution calling upon the President for the papers was adopted, but Washington, not wishing to create a precedent, refused obedience to it, claiming that the House, being no part of the treaty-making power, was not entitled, of right, to see the documents in question.

Jefferson, in a letter to Monroe, stated<sup>4</sup> the position as follows: “We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the

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<sup>3</sup> Before this, in the case of *The Peggy* (1 Cr. 103), Marshall had declared: “When a treaty is the law of the land and as such affects the rights of parties litigating in court, that treaty as such binds those rights, and is as much to be regarded by the court, as an act of Congress.”

For a discussion of the self-executory character of the treaties of the United States with Great Britain and other countries providing for the enforcement of American liquor laws beyond the territorial waters of the United States, see the article “Are the Liquor Treaties Self-Executing?” by Professor E. D. Dickinson, in 20 *American Journal of International Law*, 444.

For reaffirmation of the doctrine that treaties may operate without the aid of legislation see *Headmoney Cases* (102 U. S. 580); *Chew Heong v. United States* (112 U. S. 536); *Whitney v. Robertson* (124 U. S. 190); *Maiorano v. B. & O. R. Co.* (213 U. S. 268); *Asakura v. Seattle* (265 U. S. 332).

<sup>4</sup> *Works*, IV, 134.

treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piamingo, or any other Indian, Algerine or other chief."

Washington, in his special message refusing compliance with the request of the House's resolution, said: "Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them, we have declared, and they have believed, that, when ratified by the President, with the advice and consent of the Senate, they become obligatory. . . . As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."

After some discussion, the House receded from its position and passed the laws and appropriations necessary for carrying the treaty into effect.

When the question of purchasing Louisiana came up, Jefferson, in conformity with his views stated in the letter to Monroe, at first proposed to submit the treaty to both Houses of Congress. He later decided, however, to submit it to the Senate only, but informed the House that as soon as the treaty should be approved by the Senate, it would be submitted to Congress "for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress." And, after the treaty had been approved and ratified, he sent it to Congress saying: "You will observe that certain important conditions cannot be carried into execution but with the aid of the legislature." These legislative measures were enacted, but without any explicit statement of the principle which the House had urged in 1796.<sup>5</sup>

The question was again discussed in connection with the appropriation

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<sup>5</sup> Cf. Moore, *Digest of International Law*, V, § 759.

called for in the treaty of 1867 purchasing Alaska from Russia. After some debate, the House appropriated the money, but prefaced the act with the assertion that "the subjects embraced in the treaty are among those which by the Constitution are submitted to Congress and over which Congress has the jurisdiction; and for these reasons it is necessary that the consent of Congress should be given to the said stipulations, before the same can have full force and effect."

The Senate objected to this statement, and, after having referred the matter to a conference committee, the following compromise declaration was agreed upon: "Whereas, the President of the United States has entered into a treaty with the Emperor of Russia, . . . and whereas said stipulations cannot be carried into full force and effect, except by legislation to which the consent of both Houses of Congress is necessary; therefore be it resolved, etc." <sup>6</sup>

What has been said regarding the power of Congress to refuse to appropriate moneys for the payment of which the United States has been obligated by the treaty-making power applies with equal force to whatever other legislation may be required in order to put a treaty into full force and effect.

Though, as is seen from the foregoing, it cannot be said that precedent has established the doctrine one way or the other, it is quite clear that whatever moral obligation, as a matter of good faith, or principle of expediency, may urge Congress to pass appropriation or other laws required for putting into full force and effect agreements entered into by the treaty-making power, there is no constitutional means by which, in case of refusal, such legislation may be compelled; nor is there any constitutional right on the part of the executive or judicial branches of the Federal Government to supply the lacking legislation. A treaty is by the Constitution declared to be a law of the land, and where its provisions operate directly upon a subject, it may be enforced as such without further legislative sanction. But where the treaty is not thus directly executory, the executive and judicial departments must wait until Congress has enacted the necessary legislation. Justice McLean declares: "A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign government may be presumed to know that so far as the treaty stipulates to pay money the legislative sanction is required." <sup>7</sup>

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<sup>6</sup> For other discussions in Congress upon this subject, see Butler, *Treaty-Making Powers*, Chapter X.

<sup>7</sup> McLean, *Constitutional Law*, p. 347. As to whether the last statement of McLean is correct or not, see *post*, Section 321.

In *Foster v. Neilson*<sup>8</sup> Chief Justice Marshall with reference to the legal character of a treaty, as fixed by United States Constitutional Law, said: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the court."<sup>9</sup>

### § 305. Congress May by Statute Abrogate Treaties.

As has been said, treaties, so far as they are self-executory, are the supreme law of the land, and in this respect rest upon a plane of equality with acts of Congress. But upon no higher plane. Resulting from this, it has been held in a number of well-considered cases that an act of Congress operates to repeal or annul prior treaty provisions inconsistent with it.

In *Edye v. Robertson*,<sup>10</sup> after reviewing various cases, the court said: "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions present a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute. . . . But even in this aspect of the case, there is nothing in this law which makes it irrevocable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect which may be repealed or modified by an act of a later date. Nor is there anything in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity. . . . In short we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts of Congress as Congress may pass for its enforcement, modification or repeal."

The doctrine thus unqualifiedly stated has been repeatedly followed in

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<sup>8</sup> 2 Pet. 253.

<sup>9</sup> See also *United States v. Percheman* (7 Pet. 51), and *Garcia v. Lee* (12 Pet. 511). "If Congress . . . does not choose to carry out a treaty or if it prefers to violate one, citizens of the United States, or even subjects of foreign powers, seeking relief in our courts, may not, in that manner, be able to obtain redress for evils arising from the failure of the government of the United States to comply with treaty stipulations. The courts are bound by the laws enacted by Congress, and cannot declare them either unconstitutional or inoperative because they violate national contracts or national good faith and honor." *Butler*, I, §§ 451, 315.

<sup>10</sup> *Head Money Cases* (112 U. S. 580).



later cases.<sup>11</sup> Especially strong is the Chinese Exclusion case, *Chae Chan Ping v. United States*.<sup>12</sup>

**§ 306. Whether the Treaty-Making Power May Modify or Repeal Laws Enacted by Congress.**<sup>13</sup>

To Congress is given the power by the Constitution to legislate with reference to certain matters. We have already learned that by statute the President has been authorized in a number of instances to enter into international agreements for the regulation of certain matters within the legislative control of Congress. We have now to examine whether, without congressional direction or permission, it is competent for the treaty-making power to regulate a matter which it is within the legislative power of Congress to control; or, by international agreements, to alter arrangements which Congress has by statute already established.

That the treaty-making power extends to subjects within the ordinary legislative powers of Congress there can be no doubt. That is to say, the treaty-making power is fully competent to enter into agreements with foreign powers in respect to those matters which are binding internationally upon the United States. The question here to be considered is, however, whether these international compacts become, so far as they are self-executing, immediately binding municipally, that is, may be enforced as law in our courts. The Supreme Court has, in a number of instances, declared that treaties and acts of Congress stand, as law, upon exactly equal planes, and, therefore, that the later treaty operates to supersede the earlier law, exactly, as we have seen, the later law has the effect of abrogating a prior inconsistent treaty. Thus in *Cherokee Tobacco* case<sup>14</sup> the court said: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster v. Neilson*, 2 Pet. 253); and an act of Congress may supersede a prior treaty. (*Taylor v. Morton*, 2 Curt. C. C. 454; *The Clinton Bridge*, 1 Wolv. 155.)"

In *United States v. Lee Yen Tai*<sup>15</sup> the court declared: "That it was

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<sup>11</sup> Butler, *op. cit.*, II, 86, cites the following cases in which acts superseding prior treaties in conflict with them have been sustained by the Supreme Court: *United States v. McBratney* (104 U. S. 621); *Chew Heong v. United States* (112 U. S. 536); *Ward v. Race Horse* (163 U. S. 504); *Draper v. United States* (164 U. S. 240); *Thomas v. Gay* (169 U. S. 264); *Fong Yue Ting v. United States* (149 U. S. 698); *Chinese Exclusion Cases* (130 U. S. 581); *La Abra Silver Mining Co. v. United States* (175 U. S. 423); *United States v. Gue Lim* (176 U. S. 459).

<sup>12</sup> 130 U. S. 581.

<sup>13</sup> For a full account of discussions of this subject in Congress, see Hinds' *Precedents of the House of Representatives*, Chapters XLVIII and XLIX.

<sup>14</sup> 11 Wall. 616.

<sup>15</sup> 185 U. S. 213.



competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject. In *Foster v. Neilson* (2 Pet. 253), it was said that a treaty was 'to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' In the case of *The Cherokee Tobacco* (11 Wall. 616), this court said 'a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty.' So in the *Head Money Cases* (112 U. S. 580) this court said: 'So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.' Again, in *Whitney v. Robertson* (124 U. S. 190); 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' (See also *Taylor v. Morton*, 2 Curt. C. C. 454, Fed. Cas. No. 13,799; *Clinton Bridge Case*, Woolw. 155, Fed. Cas. No. 2,900; *Ropes v. Clinch*, 8 Blatchf. 304, Fed. Cas. No. 12,041; 2 Story, Const. § 1838.) Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty."<sup>16</sup>

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<sup>16</sup> See also *Johnson v. Browne* (205 U. S. 309).

Moore, in his *Digest of International Law* (V, 370), says: "A treaty assuming it to be made conformably to the Constitution in substance and form, has the legal effect of repealing under the general conditions of the legal doctrine that '*leges posteriores priores contrarias abrogant*,' all pre-existing federal law in conflict with it, whether unwritten as law of nations, of admiralty, and common law, or written as acts of Congress. A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty *per se*. Cushing, At. Gen. 1854 (6 Op. 291). See also *Akerman*, At. Gen. 1870 (13 Op. 354)."

In fact, however, there have been few (the writer is not certain that there have been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress.<sup>16a</sup> There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject. Furthermore, with specific reference to commercial arrangements with foreign powers, Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and, in actual practice, has in every instance succeeded in maintaining this point.

### § 307. The House of Representatives and Treaties Affecting Revenue Laws.

The House of Representatives does not participate in the treaty-making powers, but, as has been seen, as a branch of the legislative power, is concerned with the laws that are often necessary to order to make them, or certain of their provisions, effective. Furthermore, at times, it has not hesitated, by itself, or in coöperation with the Senate, to make recommendations to the treaty-making power, or to the President as to treaty arrangements that should be entered into.<sup>17</sup>

Especially with regard to treaties affecting the revenues of the United States or calling for appropriations from the public funds, the House has claimed that it should be consulted during the period of their negotiation.

In 1816 the question received an especially careful discussion in Congress with reference to a convention which the treaty-making power had entered into in 1815 with Great Britain. The house passed a bill specifically enacting in detail the provision of the treaty, with the evident purpose of making it plain that without such legislative enactment the provisions

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<sup>16a</sup> See *Davis v. Concordia*, 9 How. 280; *Fellows v. Blacksmith*, 19 How. 366; *The Clinton Bridge*, 1 Woolworth, 150; *Kull v. Kull*, 37 Hun (N. Y.), 476.

<sup>17</sup> "The provisions of the convention with China, proclaimed December 8, 1894, were self-executing, so as to modify or repeal a prior statute with which they were in conflict. Knox, At. Gen., Oct. 10, 1901 (23 Op. 545) approving opinions of Conrad Act. At. Gen., May 20, 1896 (21 Op. 347) and Harmon, At. Gen., May 26, 1896 (21 Op. 357)."

<sup>16a</sup> A possible instance in which the Supreme Court has given effect to treaty provisions which were inconsistent with existing statutes of Congress is *United States v. The Peggy* (1 Cr. 103). The treaty of 1924 between Great Britain and the United States contains provisions that are inconsistent with those of the Volstead Liquor Law as construed by the court in *Cunard Steamship Co. v. Mellon* (262 U. S. 100). The validity of these treaty provisions has not come before the courts for determination.

<sup>17</sup> For instances of this, see *Hinds' Precedents of the House of Representatives*, Vol. II, Chap. XLVIII.

would be without legal force. The Senate refused its concurrence upon the ground that the treaty was self-operative and, therefore, that the legislative approval should be only declaratory in form. After reference to a committee of conference, a bill was agreed upon between the two Houses, based upon the principle, conceded by the Senate, that "whilst some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question, how far such provision was necessary, must be founded upon the peculiar character of the treaty itself."<sup>18</sup>

This was clearly a compromise agreement, but later practice has served to strengthen the position of the House and it is believed that there has been no instance in which a treaty has, without legislative permission, been allowed to repeal or annul existing revenue laws.

In 1846, the Senate Committee on Foreign Affairs, to which had been referred a reciprocity treaty negotiated by Mr. Wheaton, reported adversely in the following words: "The committee . . . are not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of government by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them *ex directo* and by its own vigor, or it engages the faith of the nation and the faith of the legislature through which the nation acts to make the change. In either aspect it is the President and Senate who, by the instrumentality of negotiation, repeal or materially vary regulations of commerce and laws of revenue which Congress had ordained. More than this, the executive department, by the same instrumentality of negotiations, places it beyond the power of Congress to exceed the stipulated maximum of import duties for at least three years, whatever exigency may intervene to require it. In the judgment of the committee the legislature is the department of government by which commerce should be regulated and laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in examination of the extent, limits, and objects of the power to make treaties, the committee believes that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. They infer this from the language of the Constitution, from the nature and principles of our Government, from the theory of republican liberty itself, from the unvaried practice, evidencing the universal belief of all, in all periods and all parties and opinions. They think, too, that, as the general rule, the representatives of the people, sitting in their legislative capacity, with

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<sup>18</sup> Moore's *Int. Law Digest*, V, 223.

open doors, under the eye of the country, communicating freely with their constituents, may exercise this power more intelligently, more discreetly, may acquire more accurate and more minute information concerning the employments and the interests on which this description of measures will press, and may better discern what true policy prescribes and rejects than is within the competence of the executive department of the Government. To follow, not to lead; to fulfil, not to ordain, the law; to carry into effect, by negotiation and compact with foreign governments, the legislative will, when it has been announced, upon the great subjects of trade and revenue; not to interpose with controlling influence; not to go forward with too ambitious enterprise—these seem to the committee to be the appropriate functions of the Executive.”<sup>19</sup>

In the reply of Secretary Calhoun to the report of the Senate committee, Calhoun asserted that from the beginning of the government it had been the practice of the treaty-making power to compact regarding matters within the legislative powers of Congress. It will be observed, however, that neither the report, nor the reply of Calhoun bear upon the point we are now considering, namely, whether, when a treaty is entered into providing for the regulation of a matter within the ordinary legislative control of Congress, that treaty before it may be given full force and effect in this country as law, requires congressional approval.

In 1880 the House adopted by a vote of 170 yeas to 62 nays, the following Resolution: “*Resolved*, That it is the sense of this House that the negotiation by the Executive Department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign com-

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<sup>19</sup> *Compilation of Reports of the Committee on Foreign Relations*, VIII, 36. With reference to this report, Mr. Calhoun, then Secretary of State, wrote to Mr. Wheaton, “If this be the true view of the treaty-making power it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution.” He then continued: “From the beginning and throughout the whole existence of the Federal Government, it [the treaty-making power] has been exercised constantly on commerce, navigation, and other delegated powers, to the almost entire exclusion of the reserved, which, from their nature, rarely ever come into question between us and other nations. The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers. So far, indeed, is it from being true, as the report supposes, that the mere fact of a power being delegated to Congress excludes it from being the subject of the treaty stipulations, that even its exclusive delegation, if we may judge from the habitual practice of the government, does not—of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation.” *Moore's Digest of International Law*, V, 164.

modities entering the United States for consumption should be fixed would, in view of the provision of Section 7 of Article I of the Constitution of the United States, be an infraction and an invasion of one of the highest prerogatives of the House of Representatives."

However, in 1881, the House Committee on Foreign Affairs, reporting upon a resolution declaring that the treaty-making power "does not extend to treaties which affect the revenue, or require the appropriation of money to exercise them," said: "The words 'all bills for raising revenue,' in Section 7 of Article I of the Constitution, do not embrace treaties; a treaty is not a bill for raising revenue, and the requirement that 'all bills for raising revenue shall originate in the House of Representatives' is not a limitation upon the treaty-making power, but is only a condition imposed on the ordinary law-making power of the Government. . . . The Resolution under consideration (H. J. Res. 132) affirms a proposition which, under existing Constitutional provisions, cannot be sustained."<sup>20</sup>

It has earlier been seen<sup>21</sup> that the House has, however, insisted, that whether or not it has a right to participate in their negotiation, a treaty changing the existing revenue laws of the United States does not become effective to bring about this change until the approval of the House has been obtained. In other words, as to this particular subject, it has been claimed that a treaty does not, *ex proprio vigore*, become a part of the supreme law of the land. This claim has never been conceded by the treaty-making power, but, in a number of instances, as has been already pointed out, the treaty-making power has inserted in treaties negotiated by it and affecting the revenue laws of the United States, a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress, and the House has claimed that the insertion of such requirements has been, in substance, a recognition of its claim in the premises.<sup>22</sup>

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<sup>20</sup> Hinds, *op. cit.*, Vol. II, p. 990. The Resolution was laid upon the table without debate.

<sup>21</sup> *Ante*, § 307.

<sup>22</sup> In 1884 the House Committee on Ways and Means reporting upon a proposed convention between the United States and Mexico, said: "It is true the question has been raised whether it would be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of the revenue, but the practice has been uniform, and the House has always insisted that where the rates of duty are changed by treaty the approval of Congress is necessary for its execution." Referring to an amendment by the Senate to the treaty as negotiated by the President, providing that the treaty should not go into effect until the laws necessary to put it into operation should be passed by Congress and the Mexican legislature, the Committee said: "The adoption of this amendment by the Senate is a substantial admission, in the nature of a precedent, which may be expected hereafter to govern treaties affecting the revenue." H. Report, 1848, 48th Cong., 1st Sess.

To the same effect was the report of May 25, 1886, of the same Committee. H. Report 2615, 49th Cong., 1st Sess.

In 1884 the matter was the subject of a careful report from the House Judiciary Committee which had been instructed to consider "whether the President by and with the advice of the Senate, can negotiate treaties with foreign Governments by which duties levied by Congress on importations can be changed or abrogated." The Committee reported in the negative,<sup>23</sup> but too late for any action thereupon to be taken by the House before the close of the session.

A similar report was again made by the Judiciary Committee of the House in 1887, but again too late in the session for any action upon it by the House.

In 1902 the President negotiated a Convention with the Republic of Cuba affecting the customs dues to be levied by the United States upon certain commodities coming to it from Cuba, which convention contained the provision that it should not take effect "until the same shall have been approved by Congress." In the debate in the House upon the Bill to agree to the revenue changes provided for in the Convention, occasion was taken by a number of the members of the House to reaffirm the doctrine that it was not proper or constitutional that the treaty-making power should attempt, by means of international agreements, to change existing revenue laws of the United States.

In general, it may be said that the Senate has never expressly conceded the claim of the House that a treaty ratified by the treaty-making power, and affecting existing revenue laws of the United States, does not become internationally binding upon the United States and, *ex proprio vigore*, a part of the supreme law of the land. As a matter of policy, however, the Senate has, upon a number of occasions, declared that commercial negotiations affecting revenues should be determined by statutes rather than by treaties, and, upon this ground, has acted adversely upon treaties negotiated by the President and submitted to it for its approval.<sup>24</sup>

It is to be observed, before leaving this subject, that in no case has the treaty-making power, whatever its actual concessions, ever admitted in full terms its inability to fix as law matters which are within the legislative powers of Congress. Thus in 1902, Senator Cullom emphatically asserted that only with reference to the appropriation of money is legislative assistance needed in order that treaties may receive acceptance as law in our courts.<sup>25</sup>

It is to be remarked, moreover, that in *Bertram v. Robertson*<sup>26</sup> and *Whitney v. Robertson*,<sup>27</sup> though the point was not expressly discussed, it

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<sup>23</sup> H. Report 2680, 48th Cong., 2d Sess.

<sup>24</sup> See Hinds, *op. cit.*, Vol. II, pp. 998-1001.

<sup>25</sup> Cf. Butler, I, 457.

<sup>26</sup> 122 U. S. 116.

<sup>27</sup> 124 U. S. 190.

would seem that the court impliedly held that a treaty might modify revenue laws, for in these cases the effect of treaties upon existing tariff laws was considered without a suggestion that the inquiry was an unnecessary one because of the inability of the treaty power to modify such statutes.

## CHAPTER XXXVI

### THE CONSTITUTIONAL LIMITATIONS UPON THE TREATY-MAKING POWER

#### § 308. Treaty-Making Power Granted without Express Limitations.

The treaty-making power is granted in the Constitution without any express limitations as to the subjects to which it may relate. And all treaties, without qualification, are declared to be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If, then, there are many limitations to its extent, they must be found inherent in the nature of the treaties themselves, or implied in other clauses of the Constitution or in the very nature of the polity which that instrument is designed to create and maintain.

#### § 309. Implied Limitations.

No treaty has ever been held unconstitutional in any court, Federal or State, in the United States. That there are, however, limits, despite the fact that in no case has there arisen the necessity for applying them in a court of law, would appear beyond question. From the early years of the present Government to the decision of the *Insular* cases in 1901, the Supreme Court has, upon frequent occasions, stated, not only in general terms, but with reference to specific matters, that there are limits to the subjects that may, by treaty, be made the supreme law of the land. In *New Orleans v. United States* <sup>1</sup> speaking with reference to the succession of the United States Government to the French Government in Louisiana, the court said: "This succession did not authorize the United States to exercise prerogatives of sovereignty not consistent with the Constitution of the United States." In *Pollard's Lessee v. Hagan* <sup>2</sup> the court said: "It cannot be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives, and much less can it be admitted that they have capacity to receive or power to exercise them." And, later on in the same opinion: "The court denies the faculty of the Federal Government to add to its powers by treaty." In the *Cherokee Tobacco* case <sup>3</sup> the opinion declared: "It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

In *De Geofroy v. Riggs* <sup>4</sup> Justice Field declared: "The treaty power,

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<sup>1</sup> 10 Pet. 662.

<sup>2</sup> 3 How. 212.

<sup>3</sup> 11 Wall. 616.

<sup>4</sup> 133 U. S. 258.



as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. (Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. (Ware v. Hylton, 3 Dall. 199; Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U. S. 483; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California, 381.)"

In *Downes v. Bidwell*<sup>5</sup> four of the majority justices in their opinion denied the authority of the treaty-making power to "incorporate" annexed territory into the United States. And the minority declare that "a treaty which undertook to take away what the Constitution secured, or to enlarge the federal jurisdiction, would be simply void."<sup>6</sup>

These *dicta* of the Supreme Court which have been quoted are really *obiter* in that in no case was a treaty provision held void. However, the statement being so often and so positively asserted it may be taken for granted that there are constitutional limits to the treaty-making power,

<sup>5</sup> 182 U. S. 244.

<sup>6</sup> For additional declarations by the Supreme Court that treaties are necessarily subordinate to the Constitution, see *Ware v. Hylton* (3 Dall. 199); *United States v. The Peggy* (1 Cr. 103); *Lattimer v. Poteet* (14 Pet. 4); *Doe v. Braden* (16 How. 635); *Thomas v. Gay* (169 U. S. 264). In the *Wong Kim Ark* case, the minority point out that the effect of the decision of the majority is to limit the treaty-making power with reference to preventing children of resident aliens born within the United States from becoming citizens of the United States.

Calhoun, in his *Discourse on the Constitution and Government of the United States*, says: "It [the treaty-making power] is limited by all the provisions of the Constitution which inhibit certain acts from being done by the government, or any of its departments; of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress as the law-making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power whenever money is required to carry a treaty into effect; which is usually the case, especially in reference to those of much importance. There still remains another, and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government." I *Works*, 203.

and that when these limits are overstepped, the courts will interpose their veto.

**§ 310. The Treaty-Making Power and the Reserved Rights of the States.**

The supremacy of a Federal treaty over a conflicting State law, with reference to matters not reserved to the States, has not been questioned since the time it was established that a Federal statute, enacted within either the concurrent or exclusive constitutional competency of Congress, operates to nullify all inconsistent State legislation. In this respect, as the Constitution expressly declares, treaties and acts of Congress are upon precisely the same footing.

In *Ware v. Hylton*,<sup>7</sup> decided in 1796, Justice Chase said: "There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State constitutions, or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State; and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only by a repeal or nullification of a State legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded."

In *Fairfax v. Hunter*,<sup>8</sup> *Chirac v. Chirac*,<sup>9</sup> *Hauenstein v. Lynham*,<sup>10</sup> and other cases, the doctrine declared in *Ware v. Hylton* was approved and applied.

The attempt has been made to detract from the force of Chase's doctrine as declared in *Ware v. Hylton*, by emphasizing the fact that in that case the treaty in question was the one which had been originally entered into under the Confederation, that is, at a time when the States were severally sovereign, and that, therefore, it was a treaty to which the States may be said to have individually assented. There would not, however,

<sup>7</sup> 3 Dall. 199.

<sup>8</sup> 7 Cr. 603.

<sup>9</sup> 2 Wh. 259.

<sup>10</sup> 100 U. S. 483.

seem to be much force in this, for if, after the adoption of the Constitution, the treaty in question could be considered in any way as still an instrument deriving its validity from the consent of the State, it could have been abrogated by subsequent State action, but this, of course, was expressly denied by the court in *Ware v. Hylton*. The truth is that the Constitution puts treaties, made and to be made, upon exactly the same footing, and in the later cases which are cited above, the doctrine of *Ware v. Hylton* is considered as controlling with reference to treaties made after the adoption of the Constitution.

In a number of cases State laws and State constitutional provisions with reference to the rights of Asiatics within their respective State limits have been held void because in conflict with existing Federal treaties;<sup>11</sup> and in a number of other cases the Supreme Court, while holding that the questioned State laws or ordinances were not in conflict with treaty provisions, has declared, or by its careful examination of the question has implied, that it would have held them void had a conflict been found to exist.<sup>12</sup>

It may, then, be considered as established that a treaty entered into by the Federal Government with respect to a matter within the Federal jurisdiction is supreme over a conflicting State law. This leads to the question whether, by an exercise of the treaty-making power, the Federal Government may regulate matters within the States which it may not control by act of Congress, and if, in this respect, the treaty-making power is broader than the legislative, in what respects, and to what extent, it is broader.

#### § 311. Judicial Dicta that Reserved Rights of the States May Not Be Infringed.

Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power.

In *Prevost v. Greenaux*<sup>13</sup> the court said: "That a treaty is no more the supreme law of the land than is an act of Congress is shown by the fact that an act of Congress vacates *pro tanto* a prior inconsistent treaty. Whenever, therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the States, a treaty to the same effect would be unconstitutional."

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<sup>11</sup> *Parrott's Case* (7 Sawyer, 527); *Baker v. Portland* (5 Sawyer, 577).

<sup>12</sup> See, for example, *Compagnie Française v. State Board of Health* (186 U. S. 380); *Maiorana v. Railroad Co.* (213 U. S. 268); *Peterson v. Iowa* (245 U. S. 170); *Frederickson v. Louisiana* (23 How. 445).

<sup>13</sup> 19 How. 1.

In the License cases <sup>14</sup> Justice Daniel, dissenting, declared: "This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of a State and the Constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the Constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the States and of the United States."

And in a dissenting opinion in the Passenger cases <sup>15</sup> Chief Justice Taney with respect to the treaty power declared: "The first inquiry is, whether, under the Constitution of the United States, the General Government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the General Government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to prove a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person, or description of

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<sup>14</sup> 5 How. 504.

<sup>15</sup> 7 How. 283.

persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute."

In addition to the foregoing assertions of incompetence of the treaty-making power to invade the reserved rights of the States, there are the *dicta*, earlier quoted, to the effect that this power, though not in terms limited by the Constitution, is not competent to change the general character of our government. If the treaty-making power has not this power, then certainly the reserved rights of the States are not completely at its mercy. For to invade radically the exclusive jurisdiction of the States would be, in effect, to change the nature of our Federal constitutional system.

**§ 312. Instances in which Treaties Have Been Upheld though Infringing Reserved Legislative Rights of the States.**

Opposing, however, these *dicta* which have been quoted are a line of cases, in which treaties have been held constitutional with reference to matters which are admittedly not within the power of Congress to control. And, also, there have been numerous cases in which State laws with reference to matters within the ordinary legislative competence of the States, have been held void because of conflict with subsisting Federal treaties.<sup>16</sup>

Thus, in the case of *De Geofroy v. Riggs*,<sup>17</sup> to which reference has already been made, it is declared: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the

<sup>16</sup> *Ware v. Hyltan* (3 Dall. 199); *Hopkirk v. Bell* (3 Cr. 454); *Fairfax v. Hunter* (7 Cr. 603); *Chirac v. Chirac* (2 Wheat. 259); *Lattimer v. Poteet* (14 Pet. 4); *Hauenstein v. Lynham* (100 U. S. 483); *De Geofroy v. Riggs* (133 U. S. 258). See also a strong *dictum* in *Ward v. Race Horse* (163 U. S. 504).

<sup>17</sup> 133 U. S. 258.

Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. (*Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

In 1898 the President requested the official opinion of his Attorney-General as to the power of the United States to enter into treaty stipulations with Great Britain for the regulation of fisheries in the waters of the United States and Canada along the international boundary. In his opinion Mr. Griggs said: "The waters of the lake and rivers which form the boundary between the United States and Canada are upon this side of the boundary line within the territorial jurisdiction of the several riparian States. The regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction. Congress has the paramount right to regulate navigation in the navigable waters of the United States for the benefit of all the citizens of the Union, but Congress has no authority in the absence of treaty regulations, to pass laws to regulate or protect fisheries within the territorial jurisdiction of the States. (*McCready v. Virginia*, 94 U. S. 391; *Lawton v. Steele*, 152 U. S. 133.) The question for consideration, therefore, is whether the United States by treaty may deprive the riparian States of the power of control and regulation over the fisheries in the waters within their respective jurisdictions conterminal with the boundary between the United States and Canada. It is obvious that if by the exercise of the treaty-making power the regulation of this subject is assumed by the Federal Government, the respective State governments will be deprived of jurisdiction over that subject in the same waters. The regulation of fisheries has been recognized as a proper subject for international agreement. . . . Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient but almost necessary for the adequate regulation of the subject that an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of regulation and protection effective. The several States are by the Constitution forbidden to enter into any such treaty or regulation with any foreign power, and unless the United States may regulate the subject by treaty it is impossible of regulation by uniform and reciprocal rules. I advise you, therefore, that the regulation of the fisheries in these boundary waters is a proper subject of the treaty-making power vested by the Constitution in the President. If it be suggested that such a treaty is beyond the constitutional power of the President and the Senate to effect, because it deprives the States of jurisdiction and authority now vested in them, and practically would annul

their laws and destroy one subject of State sovereignty, without going into a history of that clause of the Constitution above quoted, which declares that all treaties made or which shall be made by the authority of the United States shall be the supreme law of the land (the discussions of which in the Constitutional Convention and in the State conventions called for the adoption of the Constitution were very extensive and interesting), it is sufficient to say that it has been held by the Supreme Court of the United States that it is no objection to the validity of a treaty that it establishes within State jurisdiction a different law and standard of rights from that established by the laws of the State."

One of the most striking as well as the most recent of instances in which was sanctioned Federal control by means of a treaty of a matter otherwise subject to exclusive control by the individual States of the Union, was the holding of the court in the Migratory Bird case of *Missouri v. Holland*.<sup>18</sup>

This case has been earlier considered,<sup>19</sup> but it may be here repeated that the act which, in this case, was upheld was one which the court admitted was beyond the ordinary legislative authority of Congress, because an infringement of the rights of the States, but, being in execution of a treaty, was to be held valid. As to two earlier decisions in the lower Federal courts holding unconstitutional an earlier act of Congress which in exercise of its legislative power unsupported by a treaty, had sought to regulate the killing of migratory birds within the States,<sup>20</sup> the Supreme Court said: "Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the Federal power." Earlier in the opinion the court had said: "If the treaty is valid, there can be no dispute about the validity of the statute under Article 1, § 8, as a necessary and proper means to execute the powers of the government." That the treaty was constitutional, the court declared.

In a number of instances, as said, State laws, with reference to matters ordinarily within State cognizance, have been held void when in conflict with existing Federal treaties. Examples of this, are laws denying the right of the alien to be employed by contractors upon public works, or to be employed by private corporations.<sup>21</sup>

### § 313. The True Doctrine.

How, now, are we to harmonize the previously quoted judicial *dicta* that the reserved rights of the State may not be infringed by the treaty-

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<sup>18</sup> 252 U. S. 416.

<sup>19</sup> See § 312.

<sup>20</sup> *United States v. Shauver* (214 Fed. 154); *United States v. McCullough* (221 Fed. 288).

<sup>21</sup> *Baker v. Portland* (5 Sawyer, 566); *In re Tiburcio* (6 Sawyer, 349); *In re Ah Chong* (6 Sawyer, 451). Cf. Proceedings of the American Soc. of Int. Law, 1907, address by Prof. C. N. Gregory.

making power with the fact that, in specific instances, the invasion of these rights has been upheld?

Essentially speaking, the two positions, thus absolutely stated, cannot be harmonized. There is no principle that can be stated which will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in the future.

The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

The writer is led to the belief that this will be the position finally and affirmatively taken by our judiciary from a review of the manner in which, in the past, in every instance in which it has been necessary to endow the Federal Government with a power in order that its National supremacy, and its administrative efficiency, might be preserved, the Supreme Court of the United States has found the means to do so.<sup>22</sup>

#### § 314. Constitutional Limits to the Treaty-Making Power.

Assuming, then, that the reasoning which has gone before is correct, it may be asked: Are we led to the conclusion that, in extent, the treaty-making power is without constitutional limits, and may it be predicted that in no conceived case will the Supreme Court hold void of legal force a treaty duly entered into by the treaty-making power? This question may be answered in the negative. As pointed out at the beginning of this chapter, there undoubtedly are limits to the extent of the treaty-making power which the Supreme Court may be expected to recognize and apply. It is true that all of the *dicta* that were quoted are *obiter* in that in no instance were they applied to hold a treaty provision void; yet, when we find the statement so positively asserted, and so many times repeated, we may, I think, take it as established.

If, however, as we have seen, individual rights and the reserved powers

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<sup>22</sup> A more detailed statement of this argument is given in Chapter III, and especially §§ 59, 60.



of the States may, upon occasion, be sacrificed to the treaty-making power, under what circumstances, and according to what principle, may we expect these limitations to be imposed? Briefly stated, the answer is that these limitations are to be found in the very nature of treaties. That is, that the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It cannot be employed with reference to a matter not legitimately a subject for international agreement, any more than can the States under the claim of an exercise of their police powers regulate a matter not fairly comprehended within the field of police regulation. Thus, while it might be appropriate for the United States, by treaty with England, to provide that English citizens living in the United States should have certain rights of property, or schooling privileges, etc., within the States, State law to the contrary notwithstanding, it would not be appropriate, and, therefore, would not be constitutional, for the United States by such a treaty to provide that all aliens, whether British subjects or not, should enjoy these rights within the States in which they might live. So likewise, it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution; or that a power now exercised by one of the departments of the General Government should be exercised by another department. For these are matters of domestic National law with which foreign powers have no concern. In short, the treaty-making power is to be exercised with constitutional *bona fides*.

The principle which has been stated, that, to be constitutionally valid, a treaty must have reference to a subject properly a matter for international agreement, excludes from the Federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.

It is scarcely to be conceived that the treaty-making power will ever make the attempt, but should it seek to override these prohibitions, or to alter the distribution of powers provided for in the Constitution, or in any way to change the general character of the governmental polity by that instrument created, it may be expected that the judiciary will interpose its veto. The treaty-making power in all its fulness is granted that the National Government may be preserved, that it may be efficient for the purposes for which it is created, not that it may be destroyed or changed in essential character.

It is a principle of international law that treaties between nations should be executed with *uberrima fides*. Undoubtedly, however, our courts, in construing a treaty which infringes upon the ordinary reserved rights of the States, will, when possible, so interpret it as to minimize so far as

possible the extent of this infringement. And, undoubtedly, the treaty-making power itself will, when possible, refrain from entering into treaties which will trench upon the States' reserved powers, and will, in the future, take extreme pains so to word international agreements as to render impossible an interpretation by the other signatory parties which will give to them this effect. This caution the Japanese school question in California will suggest. But in any case, the Supreme Court will be exceedingly loth to deny legal validity to a treaty provision. For it does not need to be observed that, though by holding a treaty provision unconstitutional that provision is denied legal validity in this country, the United States is not thereby released from its obligation under it to the other signatory powers, and the result is, necessarily, a breach of our covenant with those powers. The same, of course, would be true should Congress refuse to pass the legislation necessary for putting a treaty into full force and effect, unless, indeed, as is sometimes done, it were provided in the treaty itself that it was not to go into effect unless, and until, the necessary legislative assistance was obtained.<sup>23</sup>

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<sup>23</sup> Mr. Butler, in his *Treaty-Making Power of the United States*, § 3, gives the following summary of his conclusions regarding the extent of the treaty-making power in the United States: "First: That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government. Second: That this power exists in, and can be exercised by, the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc.; in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions. Third: That the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with state laws or provisions of state constitutions. Fourth: That all provisions in state statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within state jurisdiction."

**§ 315. Legislative Powers Ancillary to Treaty-Making Powers.**

One final point with reference to the extent of the treaty-making power deserves notice. This is that where, for its enforcement, a treaty requires ancillary legislation, Congress would seem to have the constitutional power to enact the needed laws, even though these may relate to matters not within the general sphere of its legislative authority. For it is to be presumed that the General Government has the power to render effective a treaty which it has the constitutional power to enter into. A somewhat analogous case is the legislative power recognized to belong to Congress with reference to matters of admiralty and marine, because of the grant to the Federal Judiciary of jurisdiction over admiralty and maritime causes.

The most striking case in which ancillary legislative power of Congress for the execution of treaties has been sustained is with reference to the Migratory Bird Act of July 3, 1918.<sup>24</sup>

**§ 316. The Treaty-Making Power May Not "Incorporate" Foreign Territory into the United States.**

As we have already learned from our examination of the insular case of *Downes v. Bidwell*,<sup>25</sup> the treaty-making power is, according to that decision, without the power to incorporate into the United States territory acquired from a foreign power. For this the consent of Congress is required. Four of the five majority justices in this case, it will be remembered, held to a distinction between incorporated and unincorporated Territories. The fifth justice (Mr. Brown) held that in no case are Territories parts of the United States in the strict constitutional sense; and that, therefore, they are not entitled to all the constitutional guarantees until, by statute, the Constitution has been extended over them, or until they have been admitted into the Union as States.<sup>26</sup>

**§ 317. The Treaty-Making Power May Alienate Territory of the United States or of a State or States.**

In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation of portions of its own territory, for the fact that the treaties were assented to by the United States is in itself evidence that it was conceded that the claim that the areas in question belonged to the United States was unfounded. There has been no instance in which territory, indisputably belonging to the United States, has been alienated to another power. Whether or not the power to do so, should the occasion arise,

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<sup>24</sup> *Missouri v. Holland* (252 U. S. 416).

<sup>25</sup> 182 U. S. 244.

<sup>26</sup> See Chapter XXXI.

exists, has been often discussed, and, in fact, we have a number of *obiter* statements upon the point from the Supreme Court.

In *De Geofroy v. Riggs*<sup>27</sup> Justice Field, in his enumeration of the limitations upon the treaty-making power, includes its inability to cede any portion of a State without its consent. In support of this declaration reference is made to the case of *Fort Leavenworth R. R. Co. v. Lowe*.<sup>28</sup> That case decided, simply, that the legislative power of Congress is exclusive over lands within a State purchased with its consent by the United States for a constitutional purpose; and that a State has the constitutional power thus to cede portions of its territory to the General Government. The court in its opinion, however, went on to say that "it is undoubtedly true that the State, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the General Government." As to the truth of this *obiter* statement, there can, of course, be no question, for, as we have already learned, the State cannot, constitutionally, have any international dealings.<sup>29</sup>

But the court went on to say: "The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country."

In support of this statement the court referred to the adjustment of the northeastern boundary dispute in 1842 with Great Britain, in which the United States before coming to an agreement with Great Britain, obtained the coöperation and concurrence of Maine and Massachusetts. Maine appointed commissioners by her legislature, and Massachusetts by her Governor under authority of an act of her legislature, to act with the Secretary of State of the United States in the matter.

This coöperation of the authorities of Maine and Massachusetts was at the suggestion of Webster, then Secretary of State, but it does not appear from his correspondence that he considered this a constitutional necessity, but rather that it was expedient from a political standpoint that the opinion of these two States should be considered.<sup>30</sup> Thus, writing privately to the Governor of Maine, December 21, 1841, Webster said: "In the present position of affairs, I suppose it will not be prudent to stir in the direction of a compromise without the consent of Maine."<sup>31</sup>

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<sup>27</sup> 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

<sup>28</sup> 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.

<sup>29</sup> Except, possibly, as we have seen with reference to such an unimportant matter as the administration of fishing upon boundary waters.

<sup>30</sup> See *Works of Webster*, V, 98; VI, 272.

<sup>31</sup> Van Tyne's *Letters of Webster*, 248; quoted in Moore, *Digest of Int. Law*, V, 174.

Besides the assertions of the Supreme Court in *De Geofroy v. Riggs* and *Fort Leavenworth R. R. Co. v. Lowe*, we have the argument of Justice White in *Downes v. Bidwell*,<sup>32</sup> that the United States is without the right by treaty to sell or trade away any portion of territory, whether within a State or a Territory, which has been "incorporated" into the United States. "In conformity to the principle which I have admitted," he said, "it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country."

Later on in his opinion Justice White was, however, forced to say: "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."

In fact, however, as we know, Justice White held that territory might be annexed by treaty without "incorporation" into the United States, and such unincorporated territory concededly might by treaty be sold or traded away.<sup>33</sup>

Opposing these judicial *obiter dicta* are the decisions of the Supreme Court in *Lattimer v. Poteet*<sup>34</sup> and the opinions of such commentators as Kent, Story and Butler.

In *Lattimer v. Poteet* the Supreme Court upheld a treaty of the United States with an Indian tribe whereby was ceded to the Indians an area claimed by a State as its own. "It is argued," said the court in its opinion, "that it was not in the power of the United States and the Cherokee Na-

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<sup>32</sup> Concurred in by Justices Shiras, McKenna and Gray.

<sup>33</sup> It will be observed that Justice White's denial to the treaty power of the right to alienate incorporated territory, save as necessitated by a disastrous war, is not predicated upon the Federal character of the United States, that is, upon a doctrine of reserved rights of the States, but upon the general constitutional character of the Federal Government as one deriving its power by grant from its citizens. Cf. *American Law Register*, February, 1907, p. 83, note.

<sup>34</sup> 14 Pet. 4.

tion, by the Treaty of Tellico in 1798, to vary in any degree the treaty line of Holston so as to affect private rights or the rights of North Carolina. . . . It is a sound principle of international law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional power, neither the rights of a State nor those of an individual can be interposed."

Kent in his *Commentaries* says: "The better opinion would seem to be, that such a power of cession of the territory of a State without its consent does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without the consent of the local government who are interested, except in cases of great necessity, in which the consent might be presumed." <sup>35</sup>

"On April 14, 1838, Edward Everett, who was then governor of Massachusetts, confidentially asked the opinion of Mr. Justice Story concerning a resolution of the Massachusetts legislature, which had been presented to him for his signature, in which it was declared that no power delegated by the Constitution to the United States authorized the government to cede to a foreign nation any territory lying within the limits of a State of the Union. Mr. Everett called attention to the fact that in section 1502 of Story's *Commentaries on the Constitution*, in which certain restrictions on the treaty-making power were named, that of ceding a part of a State was not mentioned, but that the remark was added, 'Whether there are any other restrictions necessarily growing out of the structure of the government will remain to be considered whenever the exigency shall arise.' Mr. Everett further observed that the restriction in question, if it existed, must be one of this character, but that the pending controversy did not appear to him to create such an exigency, since it was a question not of ceding an admitted part of the territory of Maine, but of ascertaining the boundary between British and American territory. Mr. Justice Story, on the 17th of April, replied that he could not admit it to be universally true that the Constitution of the United States did not authorize the government to cede to a foreign nation territory within the limits of a State, since such a cession might, for example, be indispensable to purchase peace, or might be of a nature calculated for the safety of both nations or be an equivalent for a like cession on the other side. The learned justice added that he had some years previously had a conversation on the subject with Chief Justice Marshall. 'He was,' said Mr. Justice Story, 'unequivocally of opinion, that the treaty-making power did extend to cases

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<sup>35</sup> I, 167, note b.

of cession of territory, though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some."<sup>36</sup>

Mr. Butler's views as to the constitutional effect of the treaty-making power have already been quoted in this chapter. They grant to the Federal Government full power to alienate without the consent of a State, any portion or all of its territory. On page 394 of his second volume, Mr. Butler, after referring to the settlement of the northeastern boundary, says: "If it be said only a part of a State was involved in that case, and that although the power might possibly be exercised as to a part of a State, an entire State could not have been ceded away, the answer can only be that if the salvation of every other State in the Union depended upon the boundary line being so fixed that an entire State should be included in British possessions, and in default thereof the Union might have been plunged into a war resulting in its destruction, undoubtedly the treaty-making power in the Central Government would have been able to accomplish that result, and it might have been just as necessary to exercise it, as at times it has been necessary to amputate a limb in order to save the life itself; in such extreme cases (and it is to be hoped they will never occur) the full extent of the power would have to be exercised—regretfully indeed but nevertheless effectually."

In accordance with the principles already laid down in this chapter, the author of this treatise is of the opinion that the United States has, through its treaty-making organ, the constitutional power, in cases of necessity, to alienate a portion of, or the entire territory of a State or States. The same reasoning which supports the power of the United States, as a sovereign power in international relations, to annex territories, is sufficient to sustain its power to part with them, even should the area so parted with be a part of one of the States or include one or more of them.

Should territory be alienated to a foreign power, it would seem that this would have to be done by treaty. Should, however, the alienation be by the way of granting independence to a particular territory, as, for example, Porto Rico or the Philippine Islands, this could be done by joint resolution. Should the people of a territory revolt against the United States control, establish a *de facto* government, and realize in fact its independence, this independence might be recognized by a treaty. But in such case the treaty would recognize a *fait accompli*, rather than bring it about.<sup>37</sup>

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<sup>36</sup> Story, *Life of Joseph Story*, II, 286-289. Quoted by Moore, *International Law Digest*, V, 172.

<sup>37</sup> For a further discussion of the cession of territory by treaty, see Crandall, *Treaties, Their Making and Enforcement*, Section 99.

**§ 317a. The Violation of Treaties.**

Treaties entered into by the United States may be viewed in two lights: (1) as constituting parts of the supreme law of the land, and (2) as compacts between the United States and foreign Powers. Viewed in this second light this infraction is a matter outside judicial cognizance, and within the exclusive concern of the political departments.

In *Taylor v. Morton*,<sup>38</sup> approved by the Supreme Court,<sup>39</sup> Justice Curtis said: "Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the view and acts of a foreign sovereign, manifested through his representative, has given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and legislative departments of our government."

The rule thus laid down in *Taylor v. Morton* has been uniformly followed in subsequent cases. In *Head Money Cases*,<sup>40</sup> the court said: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens."

Again, in *Whitney v. Robertson*,<sup>41</sup> the opinion declared: "A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as

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<sup>38</sup> 2 Curtis, 454.

<sup>39</sup> 2 Black, 481.

<sup>40</sup> 112 U. S. 580.

<sup>41</sup> 124 U. S. 190.



legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either power over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance."

#### § 318. Treaties and Private Rights.

Because, under the United States Constitution, treaties are the supreme law of the land as well as international compacts, they prescribe, if self-executing, rules in accordance with which private rights may be determined.<sup>42</sup>

#### § 319. Construction of Treaties.

So far as treaties are regarded as international compacts, the national rights and obligations accruing thereunder are determined by the political departments of the Government.<sup>43</sup> So far as they are of the nature of legislative acts, and rights accruing thereunder come before the courts for determination and enforcement, the courts necessarily have to construe them.<sup>44</sup> When possible, however, the courts will give to the treaties the construction which they may have previously received by the political departments of the Government. This is, however, not an absolutely obligatory rule.<sup>45</sup> It is one of expediency, and of due regard by one of the departments of the Government for the opinion of another and coördinate department.

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<sup>42</sup> *Edge v. Robertson* (112 U. S. 580).

<sup>43</sup> *Whitney v. Robertson* (124 U. S. 190); *Toater v. Neilson* (2 Pet. 253).

<sup>44</sup> *Scharpf v. Schmidt* (172 Ill. 255); *Jones v. Meehan* (175 U. S. 1); *United States v. Arredondo* (6 Pet. 691).

<sup>45</sup> *Castro v. De Uriarte* (16 Fed. 93).

In *Charlton v. Kelly*,<sup>46</sup> the court said: "A construction of a treaty by the political department of the Government while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight."

When the courts have given a construction to a treaty, the political departments of the Government hold themselves bound thereby. Thus, in the case of *Maronano v. B. & O. R. R. Co.*,<sup>47</sup> the Supreme Court had construed the treaty of 1871 between the United States and Italy. In a communication to the Italian Ambassador, the American Acting Secretary of State, referring to this case, said: "This decision of the Supreme Court of the United States is, so far as the Government of the United States is concerned, conclusive as to the meaning of this treaty."<sup>48</sup>

### § 320. Existence of a Treaty.

Whether or not a treaty is to be deemed still in force is for the political departments of the Government to determine. In *Terlinden v. Ames*<sup>49</sup> the court said: "On the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance." In this case the question was as to the continued existence of an extradition treaty which had been entered into by the United States with the Kingdom of Prussia prior to its incorporation into the German Empire, and which subsequently to such incorporation had not been formally renewed as between the United States and the Empire, but which had been treated by the two governments as still in force.

### § 321. Treaties Remain Internationally Binding Upon the United States Even when Congress Has Refused the Legislation Necessary to Put Them into Full Force and Effect, or when It Has Abrogated Them by Subsequent Legislation, or when the Supreme Court Has Declared Them Unconstitutional.

It is a principle of international law that one Nation in its dealings with another Nation is not required to know, and, therefore, is not held to be bound by, the peculiar constitutional structure of that other Nation. It is required, indeed, to know what is the governmental organ through which treaties are to be ratified. But further than this it need not examine, for each State is conclusively presumed to be able to carry into full force and effect any international engagement which it, through its treaty-making power, may enter upon.

In Dana's edition of Wheaton's *International Law*, it is declared: "If a treaty requires the payment of money, or any other special act, which

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<sup>46</sup> 229 U. S. 447. Cf. *Sullivan v. Kidd* (254 U. S. 433).

<sup>47</sup> 213 U. S. 268.

<sup>48</sup> *Foreign Relations*, 1910, p. 666.

<sup>49</sup> 184 U. S. 270.

cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the Government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them to their own injury.”<sup>50</sup>

This principle the United States has not hesitated upon occasion to assert. Mr. Blaine, when Secretary of State, wrote to our minister to Hawaii, in 1881, with reference to a treaty which that country had concluded with the United States, as follows: “I am not aware whether or not a treaty, according to the Hawaiian constitution is, as with us, a supreme law of the land, upon the construction of which—the proper case occurring—every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated, and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling.”

And in 1835 with reference to the refusal of the French Chamber of Deputies to make an appropriation called for by a treaty concluded between France and this country, Mr. Wheaton wrote: “Neither government [France nor the United States] has anything to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department—the court of cassation might have refused to render some judgment necessary to give effect to the treaty. The King cannot compel the Chambers, neither can he compel the courts; but the nation is none the less respon-

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<sup>50</sup> Dana's Wheaton, § 543, note 250, citing 1 Kent, 165-166; Heffter, § 84; Vattel, lib. IV, c. 2, § 14; Halleck, 854.

sible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution." <sup>51</sup>

### § 322. The Date at Which Treaties Go into Effect.

In *Haver v. Yaker* <sup>52</sup> Justice Davis speaking with reference to the date at which a treaty goes into effect, said: "It is undoubtedly true as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. (Wheat. Int. Law, by Dana, 336.) But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's case*, reported in 6 Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the Treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

### § 323. The Termination of Treaties.

The Constitution contains no direction as to how treaties, or portions of them, may be denounced or otherwise terminated, and, as a result there has been some confusion of doctrine upon the point and a variety in practice.

### § 324. Termination by Congress.

It has earlier been pointed out that an act of Congress inconsistent with the terms of a subsisting treaty operates, to the extent of the inconsistency, to deprive such treaty of its force as law within the United States.

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<sup>51</sup> Mr. Wheaton, Minister at Copenhagen, to Mr. Butler, Attorney-General, January 20, 1835, adopted in Lawrence's *Wheaton* (1863), 459; and quoted also with approval in Meier, *Abschluss von Staatsverträgen*, Leipzig, 1, 1874, p. 168. See Moore's *Digest of Int. Law*, V, 231.

<sup>52</sup> 9 Wall. 32.

This is, however, only a matter of municipal law. As an international compact, the treaty continues to bind the United States, and, if, by such congressional action, the United States Government is rendered unable to give to it full force and effect, the other parties to it have a legitimate grievance which they can redress by the negotiation of a new agreement, or, failing peaceful modes of settlement, by more drastic means, should the grievance be deemed a sufficiently serious one.

Congress has, however, upon occasion, done more than invalidate by statute treaty provisions. It has, at times, directed or recommended that the President denounce specified treaty engagements, or that he take steps to secure their replacement by provisions which, in the opinion of Congress, will be more advantageous, or less disadvantageous, to the United States. Congress has, indeed, gone further than this and asserted its constitutional right itself to denounce treaties, or, at any rate, to make its approval a requisite for their denouncement by the Executive.

In 1798 (July 7) Congress by a Joint Resolution declared the United States "freed and exonerated from the stipulations of the treaties" with France, and "that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."<sup>53</sup> It is clear that such a declaration, thus clearly made, was equivalent to a statute annulling as a matter of municipal law such legal rights as might have accrued under it. It was, of course, a direct challenge to France, and, in fact, two days later Congress authorized hostilities against France, and, in *Bas v. Tingy*,<sup>54</sup> the court regarded these acts as declaring war.<sup>55</sup>

During President Lincoln's administration, Secretary of State Seward gave notice to Great Britain that the United States considered as terminated the Great Lakes Agreement of 1817. A Joint Resolution to that effect having passed the House of Representatives but having failed in the Senate, Congress proceeded to pass a Joint Resolution "adopting and ratifying" the notice that had been given, "as if the same had been authorized by Congress."

In 1911, President Taft, without congressional direction, gave notice to the Russian Government of the abrogation of the treaty of 1832 with that country, and communicated his action to the Senate, as a part of the treaty-making power of the government, for its approval and ratification. The approval was not, however, given in this form. Instead, the two Houses of Congress gave their approval by a Joint Resolution, that is, by a legislative rather than a treaty-making act.

The question having been raised as to the continuing force of the extradition article of the Treaty of 1842 between the United States and Great

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<sup>53</sup> 1 Stat. at L. 578.

<sup>54</sup> 4 Dall. 37.

<sup>55</sup> Cf. Corwin, *The President's Control of Foreign Relations*, p. 112.

Britain, because of the claim that Great Britain had not conformed to it, President Grant, in a special message to Congress, of June 20, 1876, said: "It is for the wisdom of Congress to determine whether the article of the treaty is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land. Should the attitude of the British Government remain unchanged, I shall not, without an expression of the will of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the Treaty of 1842."

The instances in which Congress, by Joint Resolutions, has authorized or directed the President to terminate treaties have been considerable in number.

By the Tariff Act of 1909 it was provided (Section 4) "that the President shall have power, and it shall be his duty to give notice . . . to all foreign countries with which commercial agreements in conformity with the authority granted by Section three [of the Tariff Act of 1897] have been or shall have been entered into, of the intention of the United States to terminate such agreement at a time specified in such notice;" and that, as to treaties that might contain no stipulations regarding their termination by diplomatic action, the President "is authorized to give to the Governments concerned a notice of termination of six months."

In the Seaman's Act of March 4, 1915, it was provided [Section 16], as to provisions of treaties that might be in conflict with the provisions of the Act, "the President be . . . requested and directed . . . to give notice to the several Governments, respectively, that so much as herein described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions."

In some instances the congressional action for the denunciation of a treaty has empowered the President "at his discretion" to give the necessary notice to the foreign Governments concerned. In other instances, he has been directed, that is, charged with the duty, of giving the notice. For example, the Joint Resolution of Congress of January 18, 1865, relative to the Canadian Reciprocity Treaty, declared that notice of denunciation should be given, and that "the president of the United States is hereby charged with the communication of such notice." Of the same tenor was the Joint Resolution of March 3, 1883, relative to the Treaty of Washington of 1871 with Great Britain.<sup>56</sup>

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<sup>56</sup> This Resolution declared that articles of the treaty ought to be terminated at the earliest possible time, and that to this end, "the President be and he hereby is, directed to give notice to the government of His Britannic Majesty that the provisions of . . . the articles aforesaid will terminate and be of no force on the expiration of two years next after the time of giving such notice."

The propriety of Congress thus advising or directing the President to give to foreign Governments notice of the termination of treaties between them and the United States did not go without question by the President. In 1879 President Hayes vetoed the Chinese Immigration Bill of that year upon the ground, *inter alia*, that it instructed him to abrogate certain articles of the existing treaty with China. He said: "As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution."

It is true that President Hayes in this veto message said that "the authority of Congress to terminate a treaty with a foreign Power by expressing the will of the Nation no longer to adhere to it, is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate," but it is clear that when he spoke of Congress as competent to express the will of the nation he had reference to its expression in the form of legislative enactments.

The point came to a still more acute issue in 1920, when President Wilson refused to carry out the directions of Congress contained in Section 34 of the Merchant Marine Act of that year, and asserted that the giving of such a mandatory direction to him by Congress was an unconstitutional infringement upon its part of the Executive's control of foreign affairs.<sup>57</sup>

The merits of the issue thus raised between the President and Congress are made evident when there is borne in mind the distinction between a treaty as an international compact and, under the American Constitution, as a municipal law.

In so far as a treaty is regarded as a part of the supreme law of the land it may, as has been seen, be abrogated by the legislative power, that is, by Congress and the President. This may be done by statute or joint res-

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<sup>57</sup> Statement issued by the Secretary of State, September 25, 1920.

Section 34 of the act reads as follows: "That in the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restrict the right of the United States to impose discriminatory tonnage dues on foreign vessels and on vessels of the United States entering the United States should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments, respectively, parties to such treaties or conventions, that so much thereof as imposes any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions."

olution,<sup>58</sup> and such abrogation may be expressed in so many words or implied by the enactment of laws inconsistent with subsisting treaty provisions. This, it would seem, is all the constitutional power that the Congress has with reference to treaties, although there is nothing constitutionally improper (and often there may be considerations of political expediency which warrant it), in the President asking the advice of Congress as to what steps it will be wise for him to take with reference to the entering into or the abrogation of certain treaties. Furthermore, when the Executive or the treaty-making power has denounced a treaty there may be conditions which render it politically expedient that he should obtain from Congress, as has been seen he has occasionally done, the approval of that body. But such approval, when obtained or denied, can have no constitutional effect upon the treaties concerned, unless stated in words which the courts could construe as amounting to declarations. And, even then, such legislative declarations would of course not become a part of the supreme law of the land until approved by the President or reaffirmed by a two-thirds vote if disapproved by him.

The termination of a treaty as an international compact carries with it the annulment of the agreement as a law of the land; but its annulment as a law by Congress does not carry with it its annulment as an international compact.

In so far as a treaty is regarded as an international compact, it seems almost too clear for argument that Congress, not having been made by the Constitution a participant in the treaty-making power, has no constitutional authority to exercise that power either affirmatively or negatively, that is, by creating or destroying international agreements.<sup>59</sup>

It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification although, as has been seen, this has been several times done. And, in fact, there has been at least one instance in which the President has denounced a treaty without being requested to do so by Congress, and has not submitted his denunciation to Congress for its approval or ratification. Thus, in 1899, the American Minister at

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<sup>58</sup> As to the distinction between Statutes and Joint Resolutions, see *post*, § 659.

<sup>59</sup> The author cannot, therefore, accept the conclusion of Corwin (*The President's Control of Foreign Relations*, p. 115) that "all in all, it appears that legislative precedent, which is moreover generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone." Professor Corwin himself admits that "this result no doubt transgresses the general principle of the residual power of the Executive in foreign relations." It follows, however, he says, from the power of Congress over treaty provisions in their quality as law of the land. But this congressional power, as we have seen, does not affect the force of treaties as international compacts.



Berne was directed by the Executive to notify the Swiss Government that it was the intention of the American Government to "arrest the operation" of certain clauses of the commercial treaty of 1850.<sup>60</sup> This notice was "accepted" by the Swiss Government, and no subsequent ratification of the denunciation by either Congress or the Senate was had.

There has also been one occasion at least upon which the President has denounced a treaty upon the authorization of the Senate, without the co-operation of the House of Representatives being asked or had. In his annual message to Congress the President had asked for authority to give the notice of termination required by the treaty of commerce and navigation of 1826 with Denmark, and this authorization was given to him by the Senate Resolution of March 3, 1856.

Growing out of the action thus taken by the Senate was a direction given to its Committee on Foreign Relations "to consider the expediency of some act of legislation, having the concurrence of both Houses of Congress, by which the treaty with Denmark regulating the payment of Sound dues may be effectively abrogated in conformity with the requirements of the Constitution under which every treaty is a part of 'the supreme law of the land' and in conformity with the practice of the Government in such cases, and especially to consider whether there be any defect in the notice which has been given which such legislation may be necessary to remedy."

Reporting upon the points thus referred to it,<sup>61</sup> the Committee emphatically upheld the authority of the treaty-making power, without the intervention of Congress, to terminate or modify an existing treaty. The Committee said: "The Committee are clear in the opinion that it is competent for the President and Senate, acting together, to terminate it [the treaty] in the manner prescribed by the eleventh article [of the treaty] without the aid or intervention of legislation by Congress, and that when so terminated it is at an end to every intent, both as a contract between the Governments and as a law of the land."

As to the act of Congress of 1798 declaring the treaties with France at an end, the Committee said that this was looked upon at the time as, in effect, a declaration of war—"the precursor of war, if not an act of war itself."

As to the termination of the joint occupation of Oregon by Great Britain and the United States pursuant to the convention between the two countries, which termination had been authorized by Congress, the Committee said: "Although it be true, as an exercise of constitutional power,

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<sup>60</sup> This was done because of the claim of Switzerland that, contrary to the American opinion, the most favored nation clause of the treaty had an unlimited meaning. Cf. Reeves, "The Jones Act and the Denunciation of Treaties," in the *American Journal of International Law*, Vol. XV, p. 36.

<sup>61</sup> Sen. Rep. 97, 34th Cong., 1st Sess.; *Compilation of Reports of the Committee on Foreign Relations*, Vol. VIII, p. 107.

that the advice of the Senate alone is sufficient to enable the President to give the notice, it does not follow that the joint assent of the Senate and House of Representatives involves a denial of the separate power of the Senate. . . . The assent of both Houses was certainly calculated to make the act more impressive upon England than if authorized by the Senate alone, and especially as it was known that on the policy of giving the notice at all the Senate was by no means united. The result showed the wisdom of the course pursued by the President."

It may be noted that Congress has no means whereby it may itself give a notice of termination of a treaty to the foreign government concerned, for, under the Constitution, Congress has no power to communicate directly with foreign Powers. Furthermore, in case the President refuses to give such a notice, when directed by Congress to do so, there is no constitutional way in which he can be compelled to do so.<sup>62</sup>

It may be interesting to inquire what is the effect of the abrogation or termination of a treaty upon the continuing operating force or constitutional validity of an act of Congress passed in execution of the treaty, and depending upon that fact for its constitutional validity as was the case, for example, with reference to the Migratory Bird Act of July 3, 1918.<sup>63</sup> Though the point has never received authoritative judicial determination there would seem to be little question that the legislative act would cease to be constitutionally operative.

### § 325. Japanese Treaty Rights.

The rights of Japanese citizens, resident in the United States, guaranteed to them by the Treaty of 1911 between the United States and the Empire of Japan, have given rise to very considerable discussion, and, growing out of various laws of certain of the Pacific States of the Union, some important cases have come before the Supreme Court of the United States. However, in them, no new determinations of the extent of the treaty-making power of the United States or of the relation of the reserved rights of the States to the Federal treaty power, were made. It was assumed in all of them that, if the State laws were in conflict with the provisions of the treaty, they would be void, and the points at issue were thus resolved into one of treaty interpretation.

In *Terrace v. Thompson*,<sup>64</sup> it was held that in so far as a law of the State of Washington prohibited aliens who had not declared their intention to become citizens of the United States (a declaration which, by Federal statute, the Japanese were not qualified to make) from leasing lands for agricultural purposes, was not in conflict with the treaty which gave to

<sup>62</sup> No compulsory legal processes can be issued against the President (see *post*, section 979), but Congress could, of course, if it saw fit, institute impeachment proceedings against him.

<sup>63</sup> 37 Stat. at L. 847.

<sup>64</sup> 263 U. S. 197.

the Japanese the right "to carry on trade . . . to own or lease and occupy houses, manufactories, warehouses and shops . . . to lease land for residential and commercial purposes, and generally to do anything incidental to or necessary for trading." The court said: "We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens of subjects of either in the territories of the other."

In *Porterfield v. Webb*,<sup>65</sup> decided upon the same day, the court found no constitutional objection to a California law which provided that aliens eligible to American citizenship might acquire and enjoy rights in lands within the State, to the same extent as citizens of the United States, and that "all aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this State, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

There was thus presented no question as to a possible conflict between the law and the treaty. As to the claim made by appellants that the law was unconstitutional in that it denied to them the equal protection of the laws, since it forbade them to own or lease lands for agricultural purpose when this right was granted to other aliens, eligible to American citizenship, the court said: "In the matter of classification, the States have wide discretion. . . . We cannot say that the failure of the California legislature to extend the prohibited class, so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable."

In *Webb v. O'Brien*,<sup>66</sup> the court held that a citizen of the United States had no legal right to enter into a contract with an alien, not eligible to citizenship under the laws of the United States, unless such alien was permitted by law to make and carry out such contract. The State of California was thus permitted to deny to resident Japanese the right to enter into what were termed "cropper" contracts under which they would obtain the right for a certain number of years to plant and harvest crops on agricultural lands, to live upon such lands, and to receive one-half of the crops thus grown. Such contracts, the court held, created an "interest" in the land which the California statute prohibited, and which the treaty between Japan and the United States did not secure to the Japanese in the United States.

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<sup>65</sup> 263 U. S. 225.

<sup>66</sup> 263 U. S. 313.

In *Frick v. Webb*,<sup>67</sup> the court held that the California Alien Land Law authorizing ownership by ineligible aliens of stock in corporations authorized to acquire, possess, enjoy or convey agricultural lands in the manner and to the extent and for the purposes prescribed by any treaty, and not otherwise, operated to prohibit the ownership by Japanese of stock in such corporations.

For a time considerable discussion, both of policy and of constitutional right, was raised by the attempt upon the part of the authorities of California to prevent resident Japanese from attending the same public schools as those attended by the non-Asiatic inhabitants of the State. As to this there was not only the question as to whether the Japanese had this right under the treaties between the United States and Japan (especially that of 1894), but, also, as to whether, if they were construed to have treaty right, it was within the constitutional limits of the treaty-making power to grant it. Thus was involved, not an ordinary case of police or commercial regulation, but the alleged creation by a Federal act of a right upon the part of aliens to attend, and obtain the benefit of institutions created by the States, and maintained exclusively by State or local taxation. Thus it could be, and was, argued that public institutions wholly maintained at the expense of the State might be reserved for the exclusive use of its own citizens.<sup>68</sup> Furthermore, it could be, and was argued that, conceding that the treaty granted to resident Japanese a general right to attend the public schools, the State would still be qualified, as a reasonable police or administrative measure, to make separate schooling provisions for Asiatic and non-Asiatic children. These various points have never received judicial determination.

### § 326. What Is a Treaty?

Earlier attention has been called to the fact that, upon numerous occasions, the President, or the Secretary of State acting for him, has entered into understandings, arrangements, or even formal agreements with foreign Powers which have not been termed treaties and which were not submitted to the Senate for its approval or disapproval. There can be little doubt that such understandings, arrangements or agreements can have only a political significance and cannot operate to create municipal law which the courts are called upon to recognize or enforce. However, the courts will give recognition to presidential agreements with foreign powers,

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<sup>67</sup> 263 U. S. 326.

<sup>68</sup> By the School Law of 1903, California had authorized local School Boards to establish separate schools for Indian children and children of Asiatic or Chinese descent, and had provided that when such schools were established such children might be excluded from all other public schools. It was under the authority of this act that the School Board of San Francisco adopted a resolution in 1906 directing that all Chinese, Japanese, and Indian children should attend a special Oriental public school.

which have not been submitted to the Senate, but which have been in pursuance of statutory authorization. Thus, in *Altman & Co. v. United States*<sup>69</sup> the court held that a commercial reciprocal agreement with France negotiated by the President under authority of the Tariff Act of 1897, was a treaty within the meaning of the Act of March 3, 1898,<sup>70</sup> giving a direct appeal from a Federal Circuit Court to the Supreme Court in cases in which the construction or validity of a treaty of the United States might be involved. The said court: "While it may be true that this commercial agreement, made under authority of the tariff act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the circuit court of appeals act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."

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<sup>69</sup> 224 U. S. 533.

<sup>70</sup> 26 Stat. at L. 826.

## CHAPTER XXXVII

### THE AMENDMENT OF THE FEDERAL CONSTITUTION

#### § 327. The Amending Clause.

The amendment of the Federal Constitution, while politically a subject of great importance, has given rise to few legal adjudications.

Article V of the Constitution provides: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as parts of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; <sup>1</sup> and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that two methods for proposing, as well as two methods for ratifying proposed amendments are provided. In practice, however, the nineteen amendments which have been added to the Constitution as originally adopted have all been proposed by Congress and that body has in each instance provided for ratification by the State legislatures.

#### § 328. States when Ratifying Proposed Amendments Act, *Quoad Hoc*, as Federal Agencies.

It is clear that when the States ratify proposed amendments to the Federal Constitution, they act, *quoad hoc*, as Federal Agencies; that is, their power so to do is derived wholly from a Federal source. This was emphatically declared in *Hawke v. Smith* <sup>2</sup> and *Rhode Island v. Palmer*,<sup>3</sup> and again declared in *Leser v. Garnett*.<sup>4</sup>

When proposing amendments it has been held that two-thirds of those

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<sup>1</sup> Art. I, Sec. 9, Cl. 1: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

Art. I, Sec. 9, Cl. 4: "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

<sup>2</sup> 253 U. S. 221.

<sup>3</sup> 253 U. S. 350.

<sup>4</sup> 258 U. S. 130.

present in the House of Congress, a quorum being present, and not two-thirds of their entire membership is required.<sup>5</sup>

Missouri Pacific Ry. Co. v. Kansas,<sup>6</sup> placed this beyond reasonable dispute. The court, after a review of established doctrine as to the overriding of a presidential veto by a two-thirds vote in the two Houses of Congress said: "The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other. . . . In consequence of the identity in principle . . . the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto."<sup>7</sup>

This holding was reaffirmed in Rhode Island v. Palmer.<sup>8</sup>

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<sup>5</sup> The question as to proposals for constitutional amendments having been raised by a member in the House of Representatives, Speaker Reed of the House said: "The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of the House.' What constitutes a House? A quorum of the membership, a majority, one-half and more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill that has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what States are present and represented, or what States are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the States directly, and they pass upon it.

"The first Congress, I think, had about sixty-five members, and the first amendment that was proposed to the Constitution was voted for by thirty-seven members, obviously not two-thirds of the entire House. (First session, First Congress, *Journal*, p. 121, Gales and Seaton ed.) So the question seems to have been met right on the very threshold of our Government and disposed of in that way."

<sup>6</sup> 248 U. S. 276.

<sup>7</sup> The court continued: "While there is no decision of this court covering the subject, in the State courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle that, in the absence of an express command to the contrary, the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties. *Farmers' Union Warehouse Co. v. McIntosh* (1 Ala. App. 407); *State v. McBride* (4 Mo. 303); *Southworth v. Palmyra & J. R. Co.* (2 Mich. 237); *Smith v. Jennings* (67 S. C. 324); *Green v. Weller* (32 Miss. 650). We say that the decisions have been without difference, for the insistence that the ruling in *State ex rel. Eastland v. Gould* (31 Minn. 189), is to the contrary is a wholly mistaken one, since the decision in that case was that, as the State Constitution required a majority of all the members elected to the House to pass a law, the two-thirds necessary to override a veto was a two-thirds vote of the same body."

<sup>8</sup> 253 U. S. 350.



The requirement of a two-thirds vote applies only to the vote on the final passage of the proposal. Proposed amendments, it has therefore been held, may be amended by a majority vote, but two-thirds are required when one House is voting finally to concur in proposals of the other House.<sup>9</sup>

#### § 329. Presidential Approval Not Required.

The President's approval of a proposed amendment is not required. In *Hollingsworth v. Virginia*<sup>10</sup> the court without argument said: "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution." In 1865 a proposed amendment having been inadvertently sent to the President, the Senate adopted the following resolution: "Resolved, That the article of amendment proposed by Congress to be added to the Constitution of the United States respecting the extinction of slavery therein having been inadvertently presented to the President for his approval, it is hereby declared that such approval was unnecessary to give effect to the action of Congress in proposing said amendment, inconsistent with former practice in reference to all amendments to the Constitution heretofore adopted, and being inadvertently done, should not constitute a precedent for the future; and the Secretary is hereby instructed not to communicate the notice of the approval of said proposed amendment by the President to the House of Representatives."<sup>11</sup>

#### § 329a. Finality of State Action.

It would seem that a State legislature which has rejected an amendment proposed by Congress, may later reconsider its action and give its approval.<sup>12</sup> In 1865 the legislature of Kentucky having rejected a proposed amendment the governor of the State, in a recommendation to the legislature, said: "When ratified by the legislatures of the several States the question will be finally withdrawn, and not before. Until ratified it will remain an open question for the ratification of the legislatures of the several States. When ratified by the legislature of a State, it will be final as to such State; and, when ratified by the legislatures of three-fourths of the several States, will be final as to all. Nothing but ratification forecloses the right of action. When ratified, all power is expended. Until ratified, the right to ratify remains."

In the foregoing quotation it is said that a State legislature having once ratified its action is final. Until three-fourths of the States have ratified,

<sup>9</sup> Hinds, *Precedents of the House of Representatives*, V, §§ 7029-7039.

<sup>10</sup> 3 Dall. 378; 1 L. ed. 644.

<sup>11</sup> For similar decisions in the House of Representatives, see Hinds, *Precedents of the House of Representatives*, V, § 7040.

<sup>12</sup> Jameson, *The Constitutional Convention*, § 576.



any State may withdraw a rejection previously given. This, in fact, was done by several States with reference to the Fourteenth Amendment, and the ratifications thus given were accepted as valid. That a ratification once given may not be withdrawn would also seem to be settled by the action taken by the Federal authorities in counting among those ratifying the Fourteenth Amendment certain States which, having ratified, later attempted to reverse this action.<sup>13</sup>

The submission in 1866 of the Fourteenth Amendment to the legislatures of the States at a time when a number of the Southern States had not yet been "reconstructed" and admitted to the full enjoyment of privileges belonging to member States of the Union, gave rise to the question whether the legislatures of the reconstruction governments in those States were constitutionally qualified to act in the premises. Seward, Secretary of State, seemed at first doubtful of this. In his proclamation of July 20, 1868, announcing the adoption of the Amendment, after saying that in six States ratification had been had "by newly constituted and established bodies avowing themselves to be and acting as the legislatures respectively" of those States, and after calling attention to the fact that Ohio and New Jersey had withdrawn their ratifications, he said, hypothetically: "If the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid Amendment are to be deemed as remaining in full force and effect, notwithstanding the subsequent resolutions of those States which purport to withdraw the consent of those States from such ratification, then the aforesaid Amendment has been ratified in the manner heretofore mentioned, and so has become valid to all intents and purposes as part of the Constitution of the United States."

Later, however, in a second proclamation Seward declared in a positive manner the Amendment to have been adopted.

The requirement of ratification by the States lately in rebellion of the Fourteenth Amendment as a condition precedent to their readmission to full constitutional rights as member States of the Union, was a requirement the imposition of which by Congress it is difficult constitutionally to justify. But, a State having yielded and ratified, the Supreme Court expressed the view in *White v. Hart*<sup>14</sup> that a claim could not be made that the ratification was void because given under duress.<sup>15</sup>

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<sup>13</sup> Jameson, §§ 577-584. But see *contra*, the article "Finality of States' Ratification of a Constitutional Amendment," by F. W. Grinnell, in 11 *Am. Bar Assn. Journal*, 192.

<sup>14</sup> 13 Wall. 646.

<sup>15</sup> The court said: "The third of these propositions is clearly unsound, and requires only a few remarks. Congress authorized the State to form a new constitution and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress

§ 330. Congress May Determine the Period within which Proposed Amendments Must Be Ratified.

In *Dillon v. Gloss* <sup>16</sup> was declared the doctrine that Congress, when proposing amendments for ratification by the States legislatures, may fix the time within which they may act effectively.

Section III of the Eighteenth Article of Amendment reads as follows: "This Article shall be inoperative unless it shall have been ratified as an Amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

"The validity of the Amendment having been questioned because of the embodiment in it of this requirement, the court, after pointing out that this was the first time that a period for ratification had been fixed by Congress, said: "Whether an Amendment proposed without fixing any time for ratification, and which after favorable action in less than the required number of States has lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still (and it may be added still is) an open question. . . . That the Constitution contains no express provision on the subject is not in itself controlling, for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing Amendments. . . .

"We do not find anything in the article which suggests that an Amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that Amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the article lead

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upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it."

<sup>16</sup> 256 U. S. 368.

to the conclusion expressed by Judge Jameson<sup>17</sup> "that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four Amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal.

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."<sup>18</sup>

It will be noted that the requirement as to the period within which it might be ratified was placed by Congress in the text of the Amendment itself and not as a part of the Resolution that it be proposed, the constitutionality of which is a different proposition, since it might well be argued that this requirement might be made a part of the proposal submitted to the State legislatures for their approval regarding which, when accepted, there could be no reasonable doubt, whereas, should the proposed Amendment itself contain no such provision, the State legislatures would not be bound by such conditions of ratification by them as Congress might have seen fit to impose. However, the Supreme Court, apparently mistaking the actual facts of the case submitted to it, stated and decided the case as

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<sup>17</sup> *Constitutional Conventions*, 4th ed., Sec. 585.

<sup>18</sup> It will be noted that the declaration of the court as to the lapsing of proposed amendments which do not receive ratification by the States within a reasonable period of time was *obiter*, inasmuch as this question was not before the court in the instant case.

though the time limit for ratification had been contained, not in the Amendment itself, but in the Joint Resolution of Congress that the Amendment be proposed to the States.<sup>19</sup>

**§ 331. Obligation of Congress upon Demand of the States to Call a Constitutional Convention.**

The Constitution provides that Congress "on the application of two-thirds of the several States, shall call a convention for proposing amendments." The States never have made use of this provision, but the question has at times been raised whether, should they do so, and Congress should refuse to act in accordance with the direction thus given to it, there is any constitutional means whereby it could be compelled to do so. It would appear that the act thus required of Congress is a purely ministerial one in substance, if not in form, and the obligation to perform it is stated in imperative form by the Constitution. If the performance of the act were placed in the hands of any Federal executive agent, except the President (in the Secretary of State, for instance), there is little doubt that the courts would issue a mandamus to compel him to act. But would they do so to Congress? It is highly doubtful. The same reasons that militate against the issuance of compulsory judicial processes to the President, militate even more strongly against the issuance of such writs to Congress.<sup>20</sup>

**§ 332. May Proposed Amendments Be Ratified by Popular Votes instead of by State Legislatures?**

With the employment by certain of the States of the Referendum the question arose whether this legislative authority might be applied to amendments to the Federal Constitution submitted by Congress to the States for ratification, and whether, indeed, this was mandatory in those cases in which the States had by statute or by constitutional provision required that this should be done.

In *State of Washington ex rel. Mullen v. Howell*,<sup>21</sup> and *Hawke v. Smith*, Secretary of State of the State of Ohio,<sup>22</sup> this question was answered in the affirmative. It was, however, negatived in the Opinion of the Justices of Maine,<sup>23</sup> and *Ex parte Dillon*.<sup>24</sup> The question finally reaching the Supreme Court of the United States in *Hawke v. Smith*<sup>25</sup> that tribunal held it was not within the constitutional power of either the Federal or State Governments to alter the methods of ratifying proposed amendments to the Federal

<sup>19</sup> Cf. comment upon this by Professor Ernst Freund in the *American Bar Association Journal*, Vol. VII (1921), p. 656.

<sup>20</sup> But see the argument of W. K. Fuller in his article "A Convention to Amend the Constitution—Why Needed—How It May Be Obtained," in the *North American Review*, March, 1911.

<sup>21</sup> 181 Pac. 920.

<sup>22</sup> 126 N. E. 400.

<sup>23</sup> 107 Att. 673.

<sup>24</sup> 262 Fed. 563.

<sup>25</sup> 253 U. S. 221.

Constitution which that Constitution itself prescribes; that the word "legislatures" as employed in Article V has the same meaning it had when the Constitution was adopted and means the representative body which makes the laws; that the ratification by a State of a proposed amendment to the Federal Constitution is not a "legislative" act in the ordinary sense of the word; that the power of a State legislature to enact laws is derived from the people of the State, but its power to ratify a proposed amendment to the Federal Constitution is derived from the Federal Constitution; and that, therefore, a State has no authority by statute or State constitutional provision, to provide that a proposed amendment to the Federal Constitution shall be submitted to a popular or referendum vote.<sup>26</sup>

This holding was reaffirmed in *Rhode Island v. Palmer*.<sup>27</sup>

### § 333. Are There Inherent Limitations upon the Amending Power?

In scope the amending power is now expressly limited as to but one subject, namely, as to the equal representation of the States in the Senate. It has however been argued that even this limitation may be evaded by adopting a constitutional amendment eliminating this limitation upon the amending power, and thus opening the way to subsequent amendments providing for unequal representation of the States in the Senate.<sup>28</sup>

It has, however, been strenuously argued by reputable writers that, although not expressly declared, there are limitations as to what may be accomplished by constitutional amendments to the Federal Constitution—limitations which are implied by the very nature of that instrument which, these writers declare, was intended to perpetuate a form of political union in which the States should have control over their own citizen composition and play a distinctive and definitively determined part in the general scheme of government that was to exist. Thus, it has been argued that the Fifteenth Amendment is unconstitutional, because it attempts, against the wills of the States that did not ratify it, to fix the composition of their several electorates.<sup>29</sup> As to this contention, it is sufficient to say that it was disposed of by the case of *Texas v. White*,<sup>30</sup> in which, speaking of the State

<sup>26</sup> As attempted by an amendment of 1918 to the Constitution of Ohio.

<sup>27</sup> 253 U. S. 350.

<sup>28</sup> Cf. Von Holst, *Constitutional Law*, p. 31, note.

<sup>29</sup> See, for example, the argument of A. W. Machen in his article "Is the Fifteenth Amendment Void?" in the *Harvard Law Review*, Vol. XXIII, p. 169 (January, 1900). Mr. Machen declares in this article that there has been no decision of the Supreme Court upholding the validity of the Fifteenth Amendment, but he is certainly mistaken as to this, for such a holding was necessarily involved in *Neal v. Delaware* (103 U. S. 370). As to this see the able article of W. C. Coleman, "The Fifteenth Amendment" in the *Columbia Law Review*, Vol. X, p. 416. In *Leser v. Garnett* (258 U. S. 130), the court cites, as recognizing the validity of the Fifteenth Amendment, *United States v. Reese* (92 U. S. 214); *Neal v. Delaware* (103 U. S. 370); *Guinn v. United States* (238 U. S. 347); *Myers v. Anderson* (238 U. S. 368).

<sup>30</sup> 7 Wall. 700.

of Texas which, at the time of this decision, had not ratified either the Thirteenth or the Fourteenth Amendment, Chief Justice Chase pointed out that by the Thirteenth Amendment the freed negroes, living in the State, necessarily became a part of its people, that the people still constituted the State, and that it was the State, as thus constituted and as a member of the Union, which was entitled to the constitutional guaranty of a government republican in form.

This disposes of the contention made by some writers that the Nineteenth Amendment, by denying to the States the right to abridge the right to vote on account of sex was in excess of the Federal Amending Power.

Similarly, there have been some who have argued that the adoption of the Eighteenth Amendment was an unconstitutional exercise of the amending power, since it sought to bring within Federal control a matter which, under the Constitution as originally drawn and adopted, it was intended should never be withdrawn from State control. So distinctively different, it is argued by writers taking this ground, is the matter of the regulation of the manufacture, sale, transportation, and exportation and importation of intoxicating liquors from all the other matters subjected by the Constitution to Federal regulation, that the Amendment constitutes an addition to the Constitution rather than an Amendment of it, and, furthermore, such an addition or graft upon it, as to disturb, if not to destroy, its essential character. And, it is declared, this brings the change outside the amending power, since, it is asserted, it could not have been the intention of the framers of the Constitution, or of those who originally adopted it, that, under the amending power, a way should be opened to defeat the essential purpose of the Constitution and thus, as it were, to destroy it.<sup>31</sup>

Space cannot be spared for a full discussion of the points thus raised. It is sufficient to say that, whatever be their merits,—which the author believes to be very slight—the Supreme Court has, in cases too numerous to cite, recognized the validity of the Eighteenth Amendment, and, in *Leser v. Garnett*<sup>32</sup> has deemed the contention as to the invalidity of the Nineteenth Amendment worth only a very summary discussion. The court in that case said: "The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment because of its character. The argument is that so great an addition to the electorate, if made without the State's

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<sup>31</sup> See, for instance, the argument of W. L. Marbury in his article "The Limitations Upon the Amending Power" in the *Harvard Law Review* (December, 1919); and also his article "The Nineteenth Amendment and After," in the *Virginia Law Review*, Vol. VII, p. 1 (October, 1920).

<sup>32</sup> 258 U. S. 130.

consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six States . . . has been recognized and acted on for half a century. The contention that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained."

To the author of the present treatise, the fundamental error of all those who have sought to place inherent limitations upon the amending power as provided for in the Federal Constitution is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is surprising to the writer that this theory which, since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought forward to support a constitutional argument.

**§ 334. Official Proclamation that an Amendment Has Been Ratified Is Conclusive upon the Courts.**

In *Leser v. Garnett* <sup>33</sup> it was argued that the Nineteenth Amendment had not been validly ratified because several of the States named in the proclamation of the Secretary of State as having ratified, had, in fact, not done so in accordance with the provisions of their several Constitutions. As to this contention the Supreme Court again pointed out that State legislatures, when ratifying proposed amendments to the Federal Constitution, are performing a Federal function and exercising a right derived from the Federal Constitution, the provisions of which transcend any limitations sought to be imposed upon by the States. As to the contention that the ratifying resolutions of Tennessee and West Virginia were adopted in violation of the rules of legislative procedure prevailing in those States, the court said: "The question raised may have been rendered immaterial by reason of the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power

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<sup>33</sup> 258 U. S. 130.

to adopt the resolutions of ratification, official notice that they had done so was conclusive upon him, and, being certified by his proclamation, is conclusive upon the courts."

**§ 335. Date when Constitutional Amendment Becomes Effective.**

In *Dillon v. Glass* <sup>34</sup> it was held that a constitutional amendment becomes effective at the time its ratification by the States is consummated, and not from the date when its adoption is proclaimed by the Secretary of State.

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<sup>34</sup> 256 U. S. 368.



## CHAPTER XXXVIII

### CONGRESS—ITS ORGANIZATION: PRIVILEGES OF MEMBERS

#### § 336. The Name.

The first section of Article I of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Following sections of this article provide for the composition and organization of these two branches of the national legislature and enumerate the powers which they may collectively or severally exercise. In the present chapter we shall be concerned with the constitutional provisions for the organization of Congress.

The term "Congress" is an old one, its international use as the title of formal meetings of heads of sovereign States or their representatives, dates from the seventeenth century.<sup>1</sup> In America the word had been used of such joint conferences as the colonies had convened. When the Articles of Confederation were drawn up, the term was applied to the confederate administrative and law-making body, and, as was but natural, the same name was given to the legislature provided for in the Constitution which replaced the Articles.

#### § 337. Qualifications for Senators and Representatives.

It is required by the Constitution that Representatives shall have attained the age of twenty-five years, have been seven years citizens of the United States,<sup>2</sup> and be, when elected, inhabitants of the State in which they are chosen.<sup>3</sup> Senators are required to be thirty or more years of age, to have been nine years citizens of the United States, and to be, when elected, inhabitants of the State for which they are chosen.<sup>4</sup>

It is furthermore provided by the Constitution that "no person holding any office under the United States shall be a member of either house during his continuance in office."<sup>5</sup>

Futhermore, by Section 3 of the Fourteenth Amendment it is declared that: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously

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<sup>1</sup> Cf. Reinsch, *American Legislatures*, Chapter I.

<sup>2</sup> This requirement was satisfied in the first Congress by assuming that the citizenship demanded could be dated from the time of the Articles of Confederation, if not, indeed, from the Declaration of Independence.

<sup>3</sup> Art. I, Sec. II, Cl. 2.

<sup>4</sup> Art. I, Sec. II, Cl. 3.

<sup>5</sup> Art. I, Sec. 6, Cl. 2.

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.”<sup>6</sup>

In 1919 the disqualification thus imposed was made the basis for the denial of a seat in the House of Representatives. Representative-elect Victor L. Berger of Wisconsin, had been indicted and convicted in a District Court of the United States for violation of certain provisions of the so-called Espionage Act of June 15, 1917,<sup>7</sup> but from this conviction an appeal was still pending. The Committee to which the Resolution of exclusion was referred, and which reported in favor of its adoption, declared that it had been governed not merely by the action of the trial court, but by other evidence introduced at hearings before the committee. Mr. Berger was refused his seat and a new election was held at which he was again elected and again refused his seat by the House.

It will be observed that habitancy and not mere residency in a State is required. Habitancy implies greater permanency than does residence. “A man’s residence is often a legal conclusion from statements showing his intention. Habitancy is a physical fact which may be proved by eye witnesses.”<sup>8</sup>

The constitutional provision is that habitancy shall exist at the time of election. It is thus legally possible for a member of Congress, after election, to become the inhabitant of another State without thereby forfeiting his seat.

It is plain that no State may add qualifications to those required by the Constitution of members of Congress. Thus in 1856, the governor of a State having refused to issue credentials to the rival claimants, because they were disqualified under provisions of the State Constitution to membership in the House, the House seated the one shown *prima facie* by official statement to have a majority of votes.<sup>9</sup> Similar action was taken by the Senate the same year.

The disqualification of a member of Congress, it has been held, does not entitle the person receiving the next highest vote, to his seat.<sup>10</sup>

Members who have already taken the oath may, it has been held, be

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<sup>6</sup> Congress has removed this disability from all, or practically all, persons suffering from it because of participation in the Civil War. Delegates from the Territories who are given the right to sit but not to vote in the House of Representatives have their qualifications and terms of office determined by Congress.

<sup>7</sup> Stat. at L., Vol. XL, p. 219.

<sup>8</sup> Cf. Foster, *Commentaries*, § 62.

<sup>9</sup> Hinds, *op. cit.*, § 415; Story, *Commentaries*, §§ 623–629.

<sup>10</sup> Hinds, § 424.

unseated by a majority vote. That is to say, disqualification being shown the process of expulsion, which requires a two-thirds vote, is not needed.<sup>11</sup>

In contested election cases each House may examine witnesses, compel testimony and the production of papers, and punish witnesses for contempt.<sup>12</sup> Imprisonment for contempt must, however, cease with the adjournment of the Congress which orders it, for with the dissolution of that body its authority necessarily ceases.<sup>13</sup>

In the case of *In re Loney*<sup>14</sup> it was held that a notary public or other State officer designated by Congress to take depositions in cases of contested election of members of the House of Representatives of the United States performs this function under the authority of Congress and not under that of the State; and that perjury alleged to have been committed before such notary or other State official is exclusively cognizable in the Federal courts. In its opinion the court said: "Any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States . . . or by the State . . . ) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States. . . . There are cases (the most familiar of which are those of making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as of the laws of the United States, and may be punishable by the judiciary of either [citing cases]. But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them unrestrained by legislation of the State, or by fear of punishment in the State courts. . . . A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the Nation or of the State) designated by act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offence against the public justice of the United States, and within the exclusive jurisdiction of the courts of the United States, and cannot therefore be punished in the courts of Virginia." <sup>15</sup>

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<sup>11</sup> Hinds, § 424.

<sup>12</sup> *Kilbourn v. Thompson* (103 U. S. 168).

<sup>13</sup> *Anderson v. Dunn* (6 Wh. 204).

<sup>14</sup> 134 U. S. 372.

<sup>15</sup> For historical accounts of the manner in which contested elections in Congress have been considered, see *Journal of Social Science*, 1870, p. 56, and *Political Science Quarterly*, XX, 421.

**§ 338. Disqualification of Congressmen to Hold Federal Office.**

The second clause of Section VI of Article I of the Constitution provides that: "No Senator or Representative shall—during the time for which he was elected—be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time, and no person holding any office under the United States shall be a member of either House during his continuance in office."

In pursuance of this provision members of Congress have had their seats declared vacant for accepting commissions as officers of the volunteer and regular army forces of the United States. Visitors to academies, directors and trustees of public Federal institutions appointed by law, are not held disqualified. In a House Report on this subject,<sup>16</sup> the committee said: "It is not contended that every position held by a member of Congress is an office within the meaning of the Constitution, even though the term office may usually be applied to many of these positions. . . . In *United States v. Hartwell* (6 Wall. 385; 18 L. ed. 830), it is laid down that 'an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.' Elsewhere it is held that an office is 'an employment on behalf of the government, in any station of public trust, nor merely transient, occasional or incidental' (20 Johns. Rep. 492). A careful consideration of all the positions above referred to will show that they are merely transient, occasional or incidental in their nature, and none of them possess the elements of duration, tenure or emolument. All of these appointees were but instruments to procure detailed information for the better information and guidance of Congress and are wholly lacking in the essential elements of an office within the meaning of the Constitution."

The House has also held that a contractor under the Federal Government is not constitutionally disqualified as a member.<sup>17</sup>

Members of Congress have frequently been appointed upon commissions created by act of Congress and authorized to investigate specific matters and report thereupon to Congress. The propriety of such appointments was considered by the Judiciary Committees of both Houses of Congress at the time President McKinley appointed Senators Cullom and Morgan and Representative Hitt as Commissioners to propose legislation for the government of the Hawaiian Islands. The House Committee made an elaborate report in which the appointments were upheld. The Senate Committee made no report, but its Chairman, Senator Hoar, made known to the President the objections of its members to such appointments, and, in result, the nominations were not confirmed by the Senate.

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<sup>16</sup> 55th Cong. 3d Sess. Rpt. No. 2205.

<sup>17</sup> For a fuller discussion of the question as to who are "officers" of the United States, see § 985.

In 1922, arose the question whether Senator Smoot and Representative Burton were eligible for appointment as members of the World War Foreign Debt Commission, which Commission had been created by Congress while Representative Burton and Senator Smoot were Members of Congress. The President was advised by Attorney General Daugherty that this might be done. In his opinion the Attorney General gave as reasons why the positions upon the Commission might not properly be termed "offices" within the meaning of the term as employed in Section 6 of Article I of the Constitution, that the commissioners were to receive no compensation, their tenure of office was to be limited in time and restricted to a single object, and the subject-matter of their duties was one in which Congress had a peculiar interest, and, as to any conclusions reached thereupon, would have to give its sanction. "In substance and effect," said the Attorney General, "your appointment to the debt commission simply puts into operation that which, without legislation, might have occurred with entire propriety, namely, a conference between the representatives of Congress charged with the final responsibility of adjusting the debt and Cabinet officers who are charged with the duty of carrying out the wishes of Congress."<sup>18</sup>

Notwithstanding this opinion, the Senate Committee on the Judiciary to which the matter was referred, reported that, in its opinion, Representative Burton and Senator Smoot were not eligible to membership on the Commission.

In its report the Committee referred to the fact that the many instances in which Members of Congress had been appointed as commissioners to draft treaties were not in point because those positions were not created by any law of Congress. Similarly not in point were the instances in which Members of Congress had been appointed upon boards or commissions to settle international disputes, those bodies having been created pursuant to treaties and not to acts of Congress.

The Committee pointed out that it is a cardinal rule of construction, especially of constitutions, that words should be taken in their natural and obvious sense, and that the term "office" when thus construed would embrace the positions in question.<sup>19</sup>

A State office does not disqualify for membership. Thus, for example, Senator La Follette held the office of Governor of Wisconsin until January, 1906, although the Senate, after his election to that body, met in extra session the preceding March. Senator La Follette did not, however, appear in the Senate or take the oath until January 4, 1906.

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<sup>18</sup> The text of the opinion is published in Sen. Rpt. 563, 67th Cong., 2d Sess.

<sup>19</sup> See Sen. Rpt. 563, 67th Cong., 2d Sess., in which the opinions of textbook writers, the definitions of dictionaries, and the judicial decisions as to the meaning of the term "office" were reviewed.

Members-elect, it has been held, may defer until the meeting of Congress their choice between their seats and incompatible offices to which they may have been elected or appointed.<sup>20</sup>

The seat of a member who has accepted an incompatible office may be declared vacant by a majority vote.<sup>21</sup>

### § 339. Ineligibility of Congressmen to Offices, the Emoluments of which Have Been Increased.

In 1909, it having been announced that President-Elect Taft intended to nominate Senator Philander C. Knox as Secretary of State, it was pointed out that he was constitutionally ineligible, the salary of the Secretary's office having been increased by a law passed while Knox was a Senator. In order to render Senator Knox eligible to the Secretaryship an act was passed by Congress reducing the salary in question to that which it had been before the increase mentioned. The strict constitutionality of this action by Congress was questioned by many.<sup>22</sup>

### § 340. Qualifications Determined by Congress.

Though essentially a judicial function the conclusive determination as to whether the constitutional qualifications for membership have been met is, by the Constitution, placed in the hands of each of the two Houses of Congress.<sup>23</sup> It thus happens that though neither House may formally

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<sup>20</sup> Hinds, § 492.

<sup>21</sup> Hinds, § 504.

<sup>22</sup> In a minority report from a House Committee (House Rpt., No. 2155, 60th Cong., 2d Sess.) it was said: "We do not believe that a provision of the Constitution that is so clear and emphatic should be sought to be annulled or suspended in the manner attempted by the passage of this bill. The emoluments of the Secretary of State were increased by the Fifty-ninth Congress. The occupant of that office has been regularly receiving these emoluments. We believe that the mischief undertaken to be provided against by this provision of the Constitution clearly embraces the act of appointing one of the said United States Senators to the office of the Secretary of State. It might be said, and truly, that this mischief is remote in any event; however this may be, it contained sufficient danger for the framers of the Constitution to provide against it. If the Constitution prohibits it, surely it can not be argued that if this prohibition can be so easily overcome by the device of reducing the salary below what in the judgment of the Congress it should be, with the hope which in this case is almost a certainty, of the salary being restored to its present amount, that that would not be clear evasion of the plain provision of the Constitution. The office of the Secretary of State will be probably held for eight years by its next incumbent, and a designing Senator, which the Constitution seeks to provide against, could reasonably anticipate, that although his salary would be temporarily reduced in the closing years of his senatorial term, at the expiration of that term it would, through his influence, be restored to the amount to which it was placed by the Congress of which he was a member, and thus he would receive the higher salary from at least two to probably eight years."

<sup>23</sup> "Each House shall be the judge of the elections, returns and qualifications of its own members." Art. I, Sec. IV, Cl. 1.

impose qualifications additional to those mentioned in the Constitution, or waive those that are mentioned, they may, in practice, do either of these things. That is to say, in case these constitutional provisions are disregarded or added to by either of the Houses of Congress, there is no judicial means of overruling their action.<sup>24</sup>

On July 2, 1862, Congress passed an act, generally known as the Test Oath Act, which provided that every person elected or appointed to any office of honor or profit under the Government of the United States, should, before entering upon the duties of his office, make oath to the fact that he had never voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility to the United States, or sought or accepted or attempted to exercise the functions of any office under the authority or pretended authority in hostility to the United States, or yielded voluntary support to any such pretended Government.<sup>25</sup> During the twenty years which this act remained in force, Congress imposed, in effect, a disqualification for membership in either of its Houses which was not imposed by the Constitution.

In a considerable number of instances the Senate or the House has excluded from membership persons presenting themselves with certifications and with all the constitutional qualifications for membership.

In the Forty-first Congress, Representative Whittemore who had escaped expulsion from the House by resigning his membership, but was again elected at a special election, was refused admission after a full debate upon the propriety of so doing. From the Forty-seventh Congress, Mr. G. Q. Cannon was excluded as a Delegate from Utah on the ground of polygamy. In 1900 the House excluded Brigham H. Roberts on the ground that he was a polygamist despite a strenuous argument that, possessing all the constitutional qualifications, he should be admitted and then, if deemed undesirable, expelled.

There has never been any serious question that the Houses of Congress may go back of the formal certificates of election of persons presenting themselves for membership in order to determine whether, in fact, such persons have actually been elected, or whether there has been so much fraud or other illegal practices at their elections as to furnish ground for vitiating their results.

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<sup>24</sup> If it should be argued that the courts might refuse to recognize the validity of a law passed by a majority that included the votes of a sufficiently large number of representatives or Senators who did not possess the necessary constitutional qualifications for membership of the House or Senate, to reduce that majority to a minority if such votes were not counted, the answer would be that the courts have held that they are not entitled to go back of the official records of Congress in order to determine whether the constitutionally required processes of legislation have been followed. Indeed, in most cases of congressional legislation, the names of the members voting *pro* or *con* are not recorded.

<sup>25</sup> 12 Stat. at L. 502.

In 1899 William A. Clark was admitted as a Senator from the State of Montana. However, a memorial from certain citizens of that State having been presented, which protested the validity of his election, the matter was referred to the Committee on Privileges and Elections. This Committee, in its majority report, found that Mr. Clark had not been legally elected as a Senator for the reason that, while he had received fifty-four votes in the State legislature as against thirty-nine opposing votes, eight of the majority votes had been obtained through illegal and corrupt means,—a number sufficient, if transferred to the minority side, to have changed it into a majority. This report was debated in the Senate, but, before final action was taken, Mr. Clark resigned as Senator.

William Lorimer was admitted to the Senate in 1909, but charges were later filed in the Senate that corrupt methods and practices had been employed in his election by the Legislature of Illinois. These charges having been referred to the Committee on Privileges and Elections, a report was rendered declaring that Mr. Lorimer had been duly and legally elected. In 1911, however, at the opening of the next (sixty-second) Congress, a new resolution was introduced asking for a reinvestigation of Mr. Lorimer's election by a special committee of the Senate, on the ground that new evidence had been secured through an investigation that had been conducted by a Committee of the Illinois State Senate, and, in June, 1911, the Senate of the State of Illinois itself presented to the Senate of the United States an official resolution asking that a further investigation be made of Mr. Lorimer's election. Based upon these and other resolutions, the United States Senate appointed a special committee which made a majority report that the previous judgment of the Senate should be deemed final and conclusive, but that, should that judgment be reconsidered, they, the majority of the Committee, found that there was no evidence that Mr. Lorimer had been personally guilty of any corrupt practices in securing his own election, or that he had had any personal knowledge of such corrupt practices or had authorized anyone to employ corrupt practices in his behalf. A minority of the Committee reported, however, that Mr. Lorimer had not been duly and legally elected, and offered a resolution that the election be declared invalid, which resolution was adopted by the Senate by a vote of fifty-five to twenty-eight. Mr. Lorimer thereupon ceased to be a member of the Senate.

On March 4, 1909, Isaac Stephenson presented his credentials certifying his election as Senator from the State of Wisconsin and was admitted to the Senate. Fifteen months later a communication from the Secretary of State of Wisconsin was presented to the Senate relating to certain corrupt practices at the primary and general election at which Mr. Stephenson had been elected, which communication, together with other documents, was referred to the Committee on Privileges and Elections for examination and report. A majority of that committee reported that Mr. Stephenson had



been legally elected Senator, but a minority declared that corruption had been proved and that Mr. Stephenson had not been duly and legally elected. The majority report was approved by the Senate.

In 1903, Reed Smoot presented his credentials as Senator from the State of Utah and was admitted to the Senate. Later, protests against his admission, on the ground that he was a polygamist, were filed and referred to the Committee on Privileges and Elections. In various forms and at various times the issue thus raised was debated during a period of four years, it being contended by some that Mr. Smoot's election should be held invalid, and, by others, that he should be expelled. The final resolution declaring him not entitled to a seat in the Senate was amended so as to require a two-thirds vote for its adoption, and was defeated by a vote of twenty-eight to forty-two.

By a vote taken on January 19, 1928, the Senate excluded from its membership Frank L. Smith upon the ground that his primary election had been tainted by reason of the acceptance and expenditure in his behalf of certain large sums of money.<sup>26</sup> The first paragraph of the resolution of exclusion read: "*Resolved*, That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith."

The instances which have been cited make it sufficiently clear that the Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted as Senators or Representatives even though possessing all the qualifications prescribed by the Constitution for membership and presenting credentials in due form of their election. It is, however, to be observed that, in these instances, the inquiries or action, except in the Smoot case, were predicated upon alleged facts which, if proved, would have tended to render irregular or invalid the elections of the Senators or Representatives concerned; and, in the Smoot case, in which the charge was against the character of the Senator-Elect, the final resolution was made to require for its adoption a majority that would have been sufficient to bring about his expulsion from the Senate. In the Stephenson case, the regularity of the primary election at which he was nominated was inquired into. The constitutional authority of Congress, before or since the adoption of the Seventeenth Amendment, to concern itself with, or by law to regulate, congressional primary elections in the States will be considered below in connection with

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<sup>26</sup> It was considered especially objectionable that some of these moneys were contributed by corporations whose interests were likely to come before the Illinois Commerce Commission of which Mr. Smith was, at the time, chairman.

the case of Truman Newberry which related to the right of the Houses of Congress to expel persons as distinguished from their right to admit them to their membership.<sup>27</sup>

### § 341. Right of Expulsion.

The Constitution provides (Art. I, Sec. 5, Cl. 2) that "Each House may . . . with the concurrence of two-thirds, expel a member."

This right of expulsion is to be sharply distinguished from the right to refuse to admit to membership. In the latter case, as has been seen, the questions involved are, in the main, and perhaps exclusively, those which relate to the constitutional qualifications of those persons presenting themselves for admission or to the regularity and legality of the elections at which such persons have been selected or appointed. In the former case, that is, of expulsion, these matters may be considered, but, in addition, action may be predicated upon the personal character or acts of the parties concerned; and, as to this last matter, as will presently be seen, the chief point of controversy has been whether the acts of which complaint is made should be only those which have occurred subsequent to election and have a bearing upon the dignity of Congress and the due performance of its functions. With the acts of members-elect committed prior to their election it has been strongly argued that the Houses should not concern themselves since the electorates should be conceded to have the right to select whom they wish to represent them in Congress, and that they should be presumed to have taken account of the characters and conduct of those whom they select.

A disregard of the foregoing doctrine, it has been urged, operates as a denial to the States of a right or privilege constitutionally provided for them. Thus we find Mr. James M. Beck, former Solicitor General of the United States, declaring: "It seems too clear for argument, that each State has the right to select from its people any representative in the Senate (or the House) that it sees fit, irrespective of his intellectual or moral qualifications," (provided he possesses the qualifications specified in the Constitution). . . . A State may have selected a member of the Senate or secured his nomination by unworthy means.<sup>28</sup> He may be intellectually unfitted for the high office, and his moral character may, in other respects, leave much to be desired. The people of the United States may justifiably think that the State has sent to Congress an unfit man, who could add nothing to its deliberations, and whose influence might well be pernicious. None the less, the State has the right to send him. It is its sole concern,

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<sup>27</sup> *Infra*, § 356.

<sup>28</sup> It is scarcely to be presumed that Mr. Beck would include means which would render the election illegal or which would corruptly change its result.

and to nullify its choice is to destroy the basic right of a sovereign State, and amounts to a revolution."<sup>29</sup>

The first precedent that, as a basis for expulsion, acts committed prior to election should not be regarded, was in the case of Senator Humphrey Marshall, in 1796, who was charged with having committed perjury.<sup>30</sup>

In 1797 William Blount was expelled from the Senate because of a high misdemeanor committed after his election.

In 1808 proceedings were instituted in the Senate looking to the expulsion of John Smith for participation in the Aaron Burr Conspiracy, but the resolution for his expulsion failed to obtain the necessary two-thirds vote, the vote standing nineteen *pro*, and ten *contra*. Mr. Smith, it is to be observed, took his seat as Senator in 1803, and thus the offence with which he was charged was after his admission to the Senate.

During the Civil War, as is well known, a number of Senators were expelled from the Senate or had their names stricken from its rolls, because of disloyal or treasonable action. In these cases, also, expulsion was based on acts subsequent to the admission of those committing them.

In 1873 steps were taken for the expulsion from the Senate of J. W. Patterson because of being implicated in the *Crédit Mobilier* scandal, but, Mr. Patterson having resigned his seat, the Senate deemed that it was incompetent to take further steps in the matter. In this case, too, it would appear that the matters charged against Mr. Patterson postdated the time of his election as Senator.

In 1893 the Senate debated at some length its right to expel William N. Roach because of an offence—embezzlement—charged to have been committed by him prior to his election. However, no final action in the premises was taken by the Senate.

The refusal of the Senate in 1867 to permit Philip F. Thomas of Maryland to take his seat was based upon acts committed by him prior to his election and was exceptional in character in that it related to acts of disloyalty to the United States which, in the opinion of the Senate, disqualified him from taking the oath of office as Senator of the United States.<sup>31</sup>

In determining whether or not a Member of Congress has been guilty of such acts as to warrant his expulsion, the House concerned does not sit as a criminal trial court, and is not, therefore, bound by the rules of evidence, and the requirements as to certitude of guilt which prevail in a criminal

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<sup>29</sup> *The Vanishing Rights of the States*, p. 54. Mr. Beck's position, it is to be observed, relates to the matter of refusal to admit a member-elect, as well as to his expulsion after admission and at any time during his membership in Congress.

<sup>30</sup> The Senate in this case disclaimed jurisdiction to determine whether, in fact, Marshall had been guilty of offence, although he had asked the Senate to investigate and determine as to this.

<sup>31</sup> For an argument in support of this see the Speech of Senator Sumner of Massachusetts, February 13, 1868 (Cong. Globe, Pt. 2, 2d Sess., 40th Cong., p. 1145).

court. In other words, the question at issue is not as to guilt of a criminal character, but only as to unfitness for participation in the deliberations and decisions of Congress. In this respect, the proceedings are similar to those of impeachment.<sup>32</sup>

### § 342. Privileges of Members of Congress.

The first clause of the sixth section of Article I of the Constitution provides: "The Senators and Representatives . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

The exemption from arrest thus given is now of little importance as arrest of the person is now almost never authorized except for crimes which fall within the classes exempt from the privilege. The words "treason, felony and breach of the peace" have been construed to mean all indictable crimes.<sup>33</sup>

Having decided in *Kilbourn v. Thompson*<sup>34</sup> that the order of the House for Kilbourn's imprisonment for contempt had been void for want of jurisdiction, the court went on to consider the personal liability of the individual members voting for and participating in the commitment for contempt. Having pointed out that these individual members had undoubtedly, by their speeches, reports and votes, approved and authorized the imprisonment of Kilbourn, and having quoted the constitutional clause with reference to the exemption of members of Congress from arrest, and from being questioned as to any speech or debate, the court asked: "Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member, speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House, of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote, is not speech or debate, of what value is the constitutional protection? We may perhaps find some aid in ascertaining the meaning of this provision, if we can find out its source, and fortunately in this there is no difficulty. For while the framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they

<sup>32</sup> See the report of the Select Committee in the cases of Oakes Ames and James Brooks. *Hinds' Precedents*, Vol. II, p. 1286. See also H. Rpt. 570, 63d Cong., 2d Sess., pp. 47, 52.

<sup>33</sup> *Williamson v. United States* (207 U. S. 425). *Hinds, Precedents of the House of Representatives*, § 2673.

<sup>34</sup> 103 U. S. 168.

did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress."

After reviewing the English case of *Stockdale v. Hansard*, and the early Massachusetts case of *Coffin v. Coffin*<sup>35</sup> and the *dictum* of Story in his *Commentaries* (§ 866) the court said: "It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it. It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the Nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the House is a good defence."

As regards the freedom of the members of Congress from prosecution for words spoken in either House, no comment is needed, except to observe that this privilege does not extend to the outside publication by a member of libelous matter spoken in Congress.<sup>36</sup> As Story observes: "No man ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation and invade the repose of other citizens."<sup>37</sup>

It may further be observed that the constitutional immunity extends to witnesses appearing before committees of Congress, and, probably, to petitions, and other addresses to that body.<sup>38</sup>

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<sup>35</sup> 4 Mass. 1.

<sup>36</sup> *King v. Creery* (1 Maule & Selw. 273).

<sup>37</sup> *Commentaries*, § 863.

<sup>38</sup> See *Columbia Law Rev.*, Feb., 1910, the excellent paper of Mr. Van Vechten Veeder, entitled "Absolute Immunity in Defamation: Legislative and Executive Proceedings."

It does not appear to have been determined whether the constitutional immunity extends to the distribution of speeches made on the floors of Congresses sent through the mails under a member's frank: nor as to the subsequent non-official publication of such speeches accompanied by the statements that they have been so made.

Reason would seem to suggest that a Member of Congress should be held liable for repeating outside of Congress libelous or slanderous statements made inside of Congress.

The English law is to the effect that the immunity of legislators from actions for defamatory statements made in Parliament is an absolute one, that is, one which cannot be overcome by showing actual malice. Whether this is so with respect to Members of Congress has not been judicially determined. The argument that the privilege should be regarded as a conditional one is stated by Professor Oliver P. Field as follows: "The grant of an absolute privilege should not be lightly implied, for it is in derogation of the right of the body of citizens as a whole. If a conditional privilege will serve to attain the same end [that is, enabling the representatives of the people to execute their functions without fear of either civil or criminal prosecution] it should be preferred. . . . It would seem that the constituent should be given that little protection which remains when he must show actual malice in the legislator. It is believed that perfect freedom of debate is only essential to effective representative government in so far as it brings forth searching and critical analysis plus such information as may be valuable in the handling of legislative business. It can hardly be argued that legislative business is aided in any way by the making of malicious statements."<sup>39</sup>

In 1876, certain members of the House reported that they had been summoned by the Supreme Court of the District of Columbia to bring certain documents in their possession or in the possession of a committee of the House to be used in pending criminal proceedings and "to attend the said court immediately to testify on behalf of the United States and not to depart from the court without leave of the court or district attorneys," and that they had attended the court. Whereupon the House adopted a resolution declaring that the mandate of the court had been a breach of the privileges of the House and that members be directed thereafter to disregard the mandate until further order of the House.<sup>40</sup>

So, also, in the same year, certain Members of the House reported that they had been summoned to appear before a grand jury of the District of Columbia, and, understanding that they might not, without the consent

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<sup>39</sup> "The Constitutional Privileges of Legislators" in *Minnesota Law Review*, April, 1925. See this whole article for a discussion of the law relating to the exemption of members of State legislators from arrest and action for defamation.

<sup>40</sup> Hinds' *Precedents*, Vol. III, § 2661.

of the House, waive their constitutional immunity to such process, submitted the matter to the House, whereupon the House, by Resolution, authorized them to appear and testify under the said summons.<sup>41</sup>

On April 22, 1879, the House adopted the following Resolution: "*Resolved*. That no officer or employee of the House of Representatives has the right, either voluntarily or in obedience to a *subpœna duces tecum*, to produce any document, paper, or book belonging to the files of the House before any court or officer, nor to furnish any copy of any testimony given or paper filed in any investigation before the House or any of its committees, or of any other paper belonging to the files of the House, except such as may be authorized by statute to be copied, and such as the House itself may have made public, to be taken without the consent of the House first obtained." <sup>42</sup>

There are no declarations of the Supreme Court as to the right of members of Congress to refuse to obey subpœnas, as the occasion for making them has not arisen, but, in *United States v. Cooper*,<sup>43</sup> in the Circuit Court for the Pennsylvania District, upon application by the accused for a letter to be addressed to several Members of Congress—Congress being then in session—requesting their attendance upon the court as witnesses in his behalf, Justice Chase said: "The Constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt Members of Congress from the service, or the obligations of a subpœna, in such cases. I will not sign any letter of the kind proposed. If, upon service of a subpœna, the Members of Congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a subpœna, that an attachment shall issue. A satisfactory reason may appear to the court, to justify, or excuse it."

In 1910, several Members of Congress having been served with a writ of mandamus in a civil action brought against them as members of the Joint Committee on Printing and growing out a refusal of a bid of the Valley Paper Company, for the furnishing of paper, the Senate resolved that the Justice issuing the writ had "unlawfully invaded the constitutional privileges and prerogatives of the Senate of the United States and of three Senators; and was without jurisdiction to grant the rule, and Senators are directed to make no appearance in response thereto." <sup>44</sup>

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<sup>41</sup> Hinds' *Precedents*, Vol. III, § 2662. In 1846 the House declined to make a general rule permitting Members to waive their privilege as to attending court as witnesses.

<sup>42</sup> Hinds' *Precedents*, Vol. III, § 2663.

<sup>43</sup> 4 Dall. 341.

<sup>44</sup> See H. R. Doc. 806, 61st Cong., 2d Sess.

**§ 343. Power of Congress to Punish.**

That Congress has the power to punish its own members for disorderly behavior and that it may punish by imprisonment a refusal to obey a rule made by it for the preservation of its own order and inflict penalties in order to compel the attendance of absent members, has not been questioned.

That Congress has also the inherent power to punish persons interfering in any way with the performance by itself as a body, or by its members, of its or their constitutional duties, is equally clear and has been repeatedly exercised. Within this power is embraced the right to punish persons for personal assaults upon Members of Congress because of what they may have said or done in the exercise of their rights or the performance of their duties as Congressmen. Upon a number of occasions the persons charged with such acts have been summoned to the bar of the House or of the Senate and reprimanded, and, in one case, that of Patrick Wood in 1870, who had assaulted a Member of the House of Representatives, the offending one was subjected by warrant of the House to three months' imprisonment in the jail of the District of Columbia.<sup>45</sup> A comparatively recent instance of the exercise of this power of the House of Representatives to punish grew out of the assault by one C. C. Glover upon Representative Sims in 1913.<sup>46</sup>

**§ 344. Power of Congress to Punish for Contempt.**

In 1821 the Supreme Court by a decision rendered in the case of *Anderson v. Dunn*<sup>47</sup> recognized the existence in Congress of a general power to punish for contempt persons disobeying its orders. In the case of *Kilbourn v. Thompson*,<sup>48</sup> however, decided in 1881, the court very much narrowed this power, holding that the power of Congress to punish for contumacy the refusal of a witness to testify before either of its Houses may be exercised only when the testimony is required in a matter regarding which the House concerned has the right to inquire. In this respect, being a legislature of limited powers, Congress could not measure its powers by those exercised by the English Parliament. Applying the foregoing principles the court in its opinion said: "In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of the opinion that the House of Representatives not only exceeded the limit of its own authority but assumed a power which could only be

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<sup>45</sup> In this case it appears that the assault was not because of any words spoken by the member in debate, but the result was to impede or delay his return to his place in the house.

<sup>46</sup> See H. Rpt. 6, 63d Cong., 1st Sess., for a statement of the power of the house in the premises.

<sup>47</sup> 6 Wh. 204.

<sup>48</sup> 103 U. S. 168.



properly exercised by another branch of the government, because the power was in its nature clearly judicial."

In the case *Re Chapman*,<sup>49</sup> however, decided in 1897, was raised the question whether the Senate had the authority to punish a refusal to testify before a committee which was inquiring with reference to the truth of charges which had been made reflecting upon the integrity of certain of its members and which, if proved, might furnish a basis for their expulsion. This power the court upheld.<sup>50</sup>

The court, furthermore, held in this case that, having the power, Congress might, instead of, or in addition to, itself punishing for contempt, provide by law that a contumacious witness be indicted and punished in the courts for a misdemeanor.

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<sup>49</sup> 166 U. S. 661.

<sup>50</sup> The court said: "In *Kilbourn v. Thompson* (103 U. S. 168), among other important rulings, it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds.

"The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire 'whether any senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

"Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is not insistent with the trust and duty of a member."

With reference to the authority of the State legislatures to punish for contempt it may be observed that their powers are much broader than those of Congress. Possessing all powers not expressly or impliedly refused them, they have been held to have a general inquisitorial power and a corresponding general authority to punish a refusal to testify or to produce papers.

In the comparatively recent case of *Marshall v. Gordon*,<sup>51</sup> the Supreme Court took occasion to review the entire question as to the extent of the power of the Houses of Congress to punish for contempt in the light of the fundamental principle of the American Constitution regarding the separation of powers. This power to deal directly by way of contempt proceedings, that is, without criminal prosecution, the court found to be implied in the right of Congress to preserve itself against acts which inherently obstruct or prevent the discharge of legislative duties, and limited to that end, and, therefore, that there was not congressional power, by contempt proceedings, to punish a person, not a Member of Congress, for writing and publishing a letter addressed to the Chairman of a sub-committee of the House, which letter contained matter deemed defamatory to the House or to its Committee. The court said: "Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson v. Dunn*, *supra*; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases, but congressional action in enacting legislation as well as in exerting the implied power, conclusively sustain the views just stated."

The court went on to point out that, except in two or three cases, all the instances in which the Senate or House of Representatives had exerted its power to deal with contempt had had to deal with physical obstruction to the legislative body in the discharge of its duties, or to physical assaults upon its members for action taken or words spoken in Congress, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or, finally, with contumacy in refusing to give testimony when there was a right to compel. In the two or three instances in which the Houses of

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<sup>51</sup> 243 U. S. 521.

Congress had gone beyond this, it would appear, said the court, that they had overlooked the distinction which exists "between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law, and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and judicial power was also sometimes forgotten; that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted." "But," the court added, "these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning."

**§ 345. The Inquisitorial Powers of Congress.**

The extent of the inquisitorial powers of Congress, that is, of its authority to summon witnesses, to require the production of documents, and to punish, as for contempt, refusal to appear and testify or to produce the documents or other evidence demanded, has appeared in the discussion, in the preceding sections, of the punitive powers of Congress. In general it may be said that Congress is constitutionally qualified to obtain, by compulsory process if necessary, violation of which may be punished as contempt, all information that will aid it, or either of its Houses, in performing the duties imposed upon it or either of its branches, by the Constitution. This competency extends to matters of admission or expulsion of members, to the determination of contested elections of members, to the confirmation of appointments, to the ratification of treaties, to the presentation of articles of impeachment, and the trial of persons thus impeached, and to all cases in which proceedings are had upon charges reflecting upon the integrity of its members, or for the purpose of maintaining their constitutional privileges as members. It is reasonably clear, however, that, in the exercise of these powers, Congress is limited by express prohibitions of the Constitution as regards unreasonable searches and seizures, self-incrimination and the like.

In *Interstate Commerce Commission v. Brimson*,<sup>52</sup> the court held that Congress, having the power to regulate interstate commerce, might create a commission to aid it in the exercise of this power, and give to that body authority to collect full and accurate information bearing upon the subject, and invest it with the right to resort to the courts in order to compel the attendance and testimony of witnesses and the production of pertinent papers and documents. However, in *Harriman v. Interstate Commerce Commission*,<sup>53</sup> the court held that the Commission had not been given

<sup>52</sup> 154 U. S. 447.

<sup>53</sup> 211 U. S. 407.

the authority to make investigations merely for the purpose of arriving at conclusions regarding additional legislation relating to the regulation of interstate commerce to be recommended to Congress for enactment. Whether or not Congress might constitutionally have given such a broad inquisitorial power to the Commission, the court did not decide. In short, as a matter of statutory construction, the court held that the Commission might make investigations, and, with the aid of the courts, compel testimony and the production of papers and documents only with regard to acts tending to defeat the purposes of the Interstate Commerce Act of 1887, and amendments thereto.

In 1924 a Committee of the Senate was authorized "to investigate circumstances and facts and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Antitrust Act and the Clayton Acts against monopolies and unlawful restraint of trade; and the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute properly, efficiently, and promptly and defend all manner of civil and commercial actions wherein the Government of the United States is interested as a party plaintiff or defendant. "And . . . further . . . to inquire into, investigate, and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States." For these purposes the Resolution creating the Committee authorized it to send for persons, books, and papers and to administer oaths.

The constitutional authority of the Senate to compel testimony and the production of relevant documents was upheld by the Supreme Court in the case of *McGrain v. Daugherty*.<sup>54</sup> In its opinion the court declared the principal questions involved to be of "unusual importance and delicacy," being "(a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution; and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."

These questions were presented in their fundamental character, for, as the court pointed out, the defendant was not questioning the right of the

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<sup>54</sup> 273 U. S. 135.

Senate Committee to require from him answers to specific questions, but to interrogate him at all.

In actual legislative practice, the court pointed out, the power to secure information as an attribute of the power to legislate had been asserted by American legislative bodies since before the Revolution, as well as by the British Parliament, and this practice had been generally upheld by State courts.<sup>55</sup> Furthermore, Congress had, by various enactments, asserted its power to obtain information by providing for the administration of oaths or affirmations to witnesses before itself or its committees,<sup>56</sup> and for their punishment, by criminal judicial proceedings, when contumacious.<sup>57</sup> After reviewing the cases of *Anderson v. Dunn*,<sup>58</sup> *Kilbourn v. Thompson*,<sup>59</sup> *In re Chapman*,<sup>60</sup> and *Marshall v. Gordon*<sup>61</sup> and pointing out that in the *Kilbourn* cases, in which the action of Congress had not been sustained, the resolution of inquiry had contained no suggestion of contemplated legislation, and that the matter involved was one in respect to which Congress had no power to legislate, the court, in the instant case said: "While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied."<sup>62</sup>

"We are of opinion," the court concluded, "That the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body can not legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Ex-

<sup>55</sup> Citing, or quoting from *Burnham v. Morrisey* (14 Gray, 226); *Wilckens v. Willet* (1 Keyes, 521); *People v. Keeler* (99 N. Y. 463); *Re Falvey* (7 Wis. 630); *State v. Frear* (138 Wis. 173), and other cases.

<sup>56</sup> Act of May 3, 1798, 1 Stat. at L. 554; act of February 8, 1817, 3 Stat. at L. 345.

<sup>57</sup> Act of January 24, 1857, 11 Stat. at L. 155.

<sup>58</sup> 6 Wh. 204.

<sup>59</sup> 103 U. S. 168.

<sup>60</sup> 166 U. S. 661.

<sup>61</sup> 243 U. S. 521.

<sup>62</sup> This last proposition, the court said, was supported in *Harriman v. Interstate Commerce Commission* (211 U. S. 407); and *Federal Trade Commission v. Am. Tobacco Co.* (264 U. S. 298).

perience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."

As to whether, in the instant case, the inquiry was one which could properly be held ancillary to the legislative powers of Congress, the court said: "It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

"The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. . . . We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part."

A question incidentally involved in the Daugherty cases was as to whether it had become moot by reason of the fact that the Congress—the Sixty-eighth—which had ordered the inquiry had expired. As to this the court said that, whatever might be the case with the House of Representatives whose members are all elected at the same time, the authority of the Senate, as a continuing body whose members are elected for terms of six years with only one-third of them re-elected each two years, was a continuing one.<sup>63</sup>

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<sup>63</sup> The court quoted from Hinds (IV, 4544-4545) the doctrine that "The Senate, as a continuing body, may continue its committees through the recess following the ex-

§ 346. Power of Congress to Vest Power to Compel Testimony in Agencies Created by Itself.

Closely connected with the power of the Houses of Congress themselves or through their Committees to compel testimony is the question as to the constitutional power of Congress to create regulatory or fact-finding bodies with the authority to compel testimony. This question will receive specific examination with reference to the authority in this respect vested in the Interstate Commerce Commission, the Federal Trade Commission and the United States Shipping Board when the nature and powers of these bodies are examined.<sup>64</sup> The matter is also one which will need consideration in connection with the subjects of the separation of powers and due process of law. It may be here pointed out, however, that such inquisitorial power has been vested by Congress in a considerable number of other bodies, such, for example, as the Rent Commission of the District of Columbia, the United States Labor Board, the United States Tariff Commission, the Commissioner of Patents, the Commissioner of Immigration, and the Commissioner of Internal Revenue; and even in private individuals acting as arbitrators under the Federal Arbitration Act of 1923, the Erdman Act of 1898 for the settlement of labor disputes, and the Newlands Irrigation Act of 1922. Mr. D. E. Lilienthal, in an able article, has examined this whole subject<sup>65</sup> and reaches the following conclusions which seem well supported by the authorities cited: "That Congress may, without violation of Article III, authorize any administrative officer or tribunal to invoke the aid of the courts to enforce the testimonial duty, regardless of the character of the investigation." "That governmental agencies may compel testimony in the course of proceedings for the determination of legal rights and duties under existing law. . . . Whether the compulsion of testimony by a governmental agency engaged solely in fact-finding deprives a witness forced to attend and testify, of his liberty and property without due process of law is an open question; the courts presented with the problem have, by construction of the acts involved, never permitted the exercise of the power; there are strong *dicta* casting doubt upon the constitutionality of such authorization by Congress."<sup>66</sup>

piration of a Congress." The situation, said the court, was measurably like that of *Southern Pacific Terminal Co. v. Interstate Commerce Commission* (219 U. S. 4918), in which it was held that a suit to enjoin the enforcement of an order of the Commission did not become moot by the expiration of the order when it was one which could be repeated by the Commission and was a matter of public interest.

<sup>64</sup> See especially, § 500.

<sup>65</sup> "The Power of Governmental Agencies to Compel Testimony" in 39 *Harvard Law Review*, 694.

<sup>66</sup> Generally with regard to the investigative powers of Congress and of the ways in which they have been exercised, see M. E. Dimock's *Congressional Investigating Committees*, published in the Johns Hopkins University, "Studies in Historical and Political Science," Vol. XLVII (1929).

